PROJECT NO. 22909

RULEMAKING RELATING TO	**§**	**PUBLIC UTILITY COMMISSION**
OUTSTANDING HB 1777	**§**	
IMPLEMENTATION ISSUES	**§**	**OF TEXAS**

ORDER ADOPTING AMENDMENTS TO §26.465 AS APPROVED AT THE SEPTEMBER 5, 2001 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts amendments to §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers, with changes to the proposed text as published in the April 6, 2001 issue of the *Texas Register* (26 TexReg 2613). The adopted amendment is necessary to implement House Bill 1777, 76th Legislature, Regular Session (1999) (HB 1777) which authorizes the commission to determine a uniform method for calculating municipal franchise compensation paid by certificated telecommunications providers (CTPs). The amendment clarifies which access lines are subject to HB 1777, specifying its application to include lines that pass through municipalities but do not terminate with end-use customers with regard to the use of public right-of-way (ROW) by CTPs. The amendment is adopted under Project Number 22909.

The commission withdraws from consideration proposed new §26.469, relating to Public Right-of-Way Fees and Penalties.

A public hearing for the taking of oral comments on the proposed amendments was held at the commission's offices on June 21, 2001 at 10:00 a.m. To the extent that the oral

comments submitted during the public hearing differed from those submitted in writing, such comments are summarized herein.

The commission received written or oral comments from Texas Coalition of Cities for Utility Issues (TCCFUI); Texas Statewide Telephone Cooperative, Inc. (TSTCI); City of Garland (Garland); WorldCom, Inc. (WorldCom); City of Plano (Plano); Level 3 Communications, L.L.C. (Level 3); City of Houston (Houston); GTE Southwest Incorporated d/b/a Verizon Southwest (Verizon); Southwestern Bell Telephone Company (SWBT); AT&T Communications of Texas, L.P. (AT&T); Texas Municipal League and the Texas City Attorneys Association (TML); CLEC Coalition, including for the purposes of these comments, El Paso Global Networks Company, e.spire Communications, Inc., Global Crossing Local Services, Inc., Intermedia Communications, Inc., Qwest Communications Corp., and Time Warner Telecom of Texas, Ltd. (CLEC Coalition); the State of Texas; Texas Coalition of Cities, including the Cities of Addison, Austin, Bedford, Colleyville, El Paso, Farmers Branch, Grapevine, Hurst, Keller, Missouri City, North Richland Hills, Pasadena, Tyler, Westlake, West University Place, and Wharton (Coalition of Cities); Central Telephone Company of Texas d/b/a Sprint and United Telephone Company of Texas, Inc., d/b/a/ Sprint (Sprint); City of San Antonio (San Antonio); City of Leon Valley (Leon Valley); McLeodUSA Telecommunications Services, Inc. (McLeodUSA); and the City of Irving, individually and as adopting the position of TCCFUI (Irving). In addition to these, persons representing City of Dallas; Grande Communications; CCG Consulting; Southwest Competitive Telecommunications Association (SWCTA); and Smith, Majcher, and

Mudge, L.L.P. attended the public hearing, but entered no testimony. The public hearing attendance list was filed in the commission's Central Records Division on June 22, 2001 under Project Number 22909.

The commission fully considered all written and oral comments.

§26.465, Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers

The proposed amendments to §26.465(d)(1)(C) and §26.465(f)(5) clarify which access lines are subject to HB 1777, specifying its application to include lines that pass through municipalities but which do not terminate at an end-use customer's premises within that municipality, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises in accordance with Texas Local Government Code §283.056(f).

GENERAL SUPPORT OF §26.465

The following parties filed written comments in general support of the commission's proposed amendment to §26.465: TSTCI, SWBT, Sprint, Verizon, AT&T, WorldCom, CLEC Coalition, Level 3, and McLeodUSA. In response to the comments submitted by other parties, AT&T referenced the arguments and authorities it previously submitted in

brief on November 29, 2000. The State of Texas also filed written comments in support of the commission's proposed amendment to §26.465.

State of Texas

The State of Texas agreed with the commission's interpretations of Texas Local Government Code, Chapter 283 and with the commission's proposed clarification amendments to the substantive rules.

Industry

TSTCI generally supported the proposed rule, as written. TSTCI characterized §26.465(f)(5) as a good clarification of the rule.

SWBT supported the commission's amendment to §26.465 because the amendment restates, correctly reflects, and further clarifies the law as stated in Texas Local Government Code §283.056(f). SWBT specifically supported the amendment to §26.465(f)(5) on the grounds that it clarifies the compensation limitations of Chapter 283.

Sprint commented that the amendments to §26.465 represent a fair standard with which to interpret the intent of HB 1777, to make clear which access lines are subject to the provisions of HB 1777, and to fairly identify what fees and penalties can and cannot be

assessed by cities. Sprint asserted that the proposed rule strikes a fair balance between municipal interests and the enhancement of competition.

Verizon supported the amendment to §26.465.

AT&T described proposed §26.465 as a proper interpretation of Chapter 283, both as to the intent of the law and the actual statutory provisions.

WorldCom welcomed the proposed amendment to clarify the status of pass-through lines.

The CLEC Coalition supported the adoption of the proposed amendment to §26.465 and urged the commission to adopt the proposed amendment.

McLeodUSA stated that it supported the amendments to §26.465 regarding pass-through lines and agreed with the CLEC Coalition's assessment of the proposed language in comments.

GENERAL OPPOSITION TO §26.465

The following cities and city representatives filed written comments in general opposition to the commission's proposed amendment to §26.465: TML, TCCFUI, Plano, San Antonio, Houston, Garland, Coalition of Cities, and Leon Valley. Irving offered oral comments at the public hearing. However, TML supported proposed subsection (f)(5).

Municipalities

TML urged the commission to delete the amendatory language proposed for §26.465(d)(1)(C).

TCCFUI stated that it concurred with the comments filed by TML and many of the cities and noted that those comments point out real harm that will occur if the amendment to §26.465 is passed.

Plano opined that the adoption of the proposed amendment to §26.465 would contradict the approach espoused by the commission in the October 21, 1999 Order adopting §26.463.

Leon Valley objected to "the proposed amendment to Local Government Code (LGC): a. 283.056(f), as given in. . . §26.465(d)(1)(C); and b. (f) lines not to be counted. (5)."

Garland urged the commission to reject the proposed revisions. Garland supported the comments filed by TCCFUI, Plano, Houston, TML, Coalition of Cities, San Antonio, and Leon Valley.

ARGUMENTS FOR AND AGAINST THE AMENDMENTS TO §26.465

Full Compensation and Access Line Definition

Parties submitted comments as to whether the amendment successfully implements "full compensation" to the cities for use of the public ROW, as intended by HB 1777, or rather, implements only a limited, incomplete amount of compensation for the various telecommunications facilities placed within the cities' public ROW. The appropriate definition as to what constitutes an "access line" as it relates to the compensation scheme is also discussed.

State of Texas

The State of Texas emphasized that the Legislature clearly stated that the compensation paid under Chapter 283 constitutes full compensation to a municipality for all of a CTP's facilities located within a public ROW, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation. The State of Texas agreed that access lines that pass through a municipality have been excluded from the Texas Local Government Code, Chapter 283 compensation regime. The State of Texas argued that the statutory provision expressly addresses those lines that do not terminate at a customer premise and the provision states that municipalities are being compensated even though the lines are not used in calculating the compensation.

Therefore, the State of Texas concluded that there is simply no room for additional compensation to be required for "other" lines located in the public ROW under alternative ordinances or franchise agreements.

Industry

SWBT suggested that the imposition of a fee or contractual requirement before a telecommunications provider is permitted to use the public ROW could have the effect of prohibiting the provision of telecommunications service. SWBT argued that the only authority under the law for imposition of any type of fee is Chapter 283, and Chapter 283 places control over the establishment of that fee with the commission.

Verizon asserted that, consistent with their comments filed in Project Number 22909 on November 29, 2000, a CTP should not be required to compensate a city for the CTP's lines that pass through the city and do not terminate at an end-use customer in that particular city. Verizon stated that such compensation would conflict with HB 1777. Verizon acknowledged that even though a CTP may not have access lines within a city, any CTP excavating within a city's ROW is still subject to that city's police powers, as well as to that city's reasonable restoration standards.

AT&T argued that Texas Local Government Code, Chapter 283 prohibits municipalities from assessing additional fees and that exemption of payment for pass-through lines does not result in free use of public assets because cities are fully compensated for all public

ROW usage in the aggregate, by the receipt of all access line fee revenues, as expressly provided in HB 1777. AT&T referenced the brief it submitted on November 29, 2000, which argued that its position is not statutory interpretation, but the Act's express language. Furthermore, AT&T maintained that assertions that the cities did not agree to this exemption in the legislative process have no legal relevance. AT&T summarized that HB 1777 established a comprehensive, statewide scheme for use of public ROWs by CTPs and for compensation to municipalities. AT&T stated that HB 1777 was designed to preserve existing levels of revenue and to speed entry into the market by new providers. Further, AT&T stated that the Legislature was clear in its statutory statement of policy and purpose and in the operative language finding that this compensation scheme is fair and reasonable and is deemed to be full compensation to a city for the use of the public ROW by a CTP. AT&T relied upon key provisions of HB 1777 to argue that the Legislature's stated purpose was to establish a uniform method of compensating municipalities that is administratively simple, competitively neutral and non-discriminatory, and provides fair and reasonable compensation. AT&T argued that wholesale facilities, network facilities that pass through a city, or other non-end-user facilities are not considered to be "access lines." AT&T contended that the access line fee under HB 1777 is the only fee a municipality is authorized to impose on a CTP for use of the ROW, and that any other fee is expressly prohibited.

AT&T maintained that: (1) CTPs in compliance with HB 1777 are not subject to municipal franchise requirements; (2) all public ROW usage is subject to §283.056, rather than just that particular ROW within the municipality in which service is being

provided; (3) municipalities may require a construction permit under their police power but may not charge a CTP for the permit; and (4) payment by CTPs of access line fees is not limited to just the city in which service is provided but applies to all CTPs, all CTP facilities, all public ROWs, to all cities, and to all compensation, other than access fees.

AT&T argued that given the practical reality of network development, CTPs typically build several fiber optic rings which may span several cities when first entering a new market. AT&T contended that a CTP must first build its system in a metropolitan area before serving retail customers with that system, which may take years before lateral lines are built off the rings to specific municipalities; therefore, until a CTP begins serving end-use customers in a municipality in which its facilities are located, the CTP will not be paying the quarterly access fees to that municipality. AT&T asserted that when the CTP serves end-use customers in a municipality, the CTP will begin to pay quarterly access fees to that city. AT&T maintained that to pay both franchise fees and access line fees would result in duplicate compensation to a city for use of the ROW. AT&T argued that CTPs have an economic incentive to achieve full utilization of their facilities; thus, pass-through lines not serving end-users may be a temporary phenomenon.

AT&T contended that the commission's access line counting rule at §26.465 recognizes lines other than access lines and ensures cities are fully compensated. AT&T opined that it is immaterial whether a particular facility is counted as an access line because the total access lines within the city and the total fees are a "proxy" and a one-to-one correlation

between lines and fees is not necessary to ensure a city receives adequate compensation. AT&T maintained that the commission already has recognized that non-access lines are not counted in determining the amount to be paid to cities as compensation for all of the usage of their ROWs.

AT&T argued that pass-through lines are covered by HB 1777, so long as the lines belong to a CTP. AT&T asserted that the definition of "access lines" excludes "interoffice transport and other transmission media that do not terminate at an end-use customer's premises," but that HB 1777 did not exclude non-access lines when it authorized CTPs to "erect poles or construct conduit, cable, switches, and related appurtenances and facilities and excavate within a public ROW to provide telecommunications service." AT&T cited §283.052(b) as stating that "all use" of a public right-of-way is subject to §283.056, and that a city can require a construction permit for a CTP "locating facilities in or on public rights-of-way within the city," which, again, are not limited to access lines, but that the city may not impose any cost on the CTP for such a permit. AT&T argued that §283.056(f) expressly states that CTP ROW usage for non end-user lines is considered to have been fully compensated by the city's receipt of access line revenues.

WorldCom expressed concern as to what is included in the term "other transmission media."

The CLEC Coalition supported approval of the proposed amendment to §26.465 because the amendment makes clear the Legislature's intent in Texas Local Government Code, Chapter 283 to develop a uniform access line based compensation scheme for use of the public ROWs by CTPs. CLEC Coalition argued that the Legislature did not intend for multiple assessments to be imposed on CTPs, and that additional fees may not be imposed on CTPs for lines that pass through a municipality. The CLEC Coalition pointed out that proposed amendments to §26.465 expressly incorporate the provisions of Texas Local Government Code, Chapter 283 that provide that compensation paid under Chapter 283 constitutes "full compensation" for all of a CTP's facilities located within the public ROW, and therefore the proposed amendments are proper implementation of Chapter 283. The CLEC Coalition supported its position with an additional argument that CTPs typically build fiber optic "rings" or "backbones" when entering a new market. The CLEC Coalition explained that CTPs have a strong economic incentive to achieve full utilization of their networks and to serve as many end-use customers as possible in each municipality served by the ring but that it takes varying amounts of time before a CTP can complete lateral lines. The CLEC Coalition argued that when the CTP builds a lateral line and begins serving end-use customers in a particular municipality, the CTP would begin paying access line fees to that municipality at that time.

The CLEC Coalition articulated four situations in which the determination of how to address pass-through lines is critical: (1) an ILEC, although it serves end-use customers in each city where it has facilities, has pass-through facilities connecting cities; (2) new CTPs that are deploying new networks in metropolitan areas before they have end-use

customers in that municipality; (3) fiber-laying CTPs that started to deploy their networks prior to HB 1777 and entered into license agreements with cities, but are now acquiring end-use customers and want to pay under Chapter 283; (4) CTPs that were formerly Interexchange Carriers (IXCs) or Competitive Access Providers (CAPs) and now desire to integrate and use their networks to provide service to end-use customers within the municipalities.

The CLEC Coalition contended that pass-through lines are not subject to the imposition of additional municipal fees. The CLEC Coalition commented that there is no legal basis for additional fees to be imposed upon a CTP that passes through a municipality but does not yet serve end-use customers located there. The CLEC Coalition stated that the municipalities' arguments against proposed §26.465 are counter to §283.056(f), which expressly recognized the existence in the public ROWs of facilities that are not access lines. The CLEC Coalition argued that §283.056(f) is straightforward and unambiguous; nonetheless, the pass-through issue has plagued new CTPs currently constructing networks to serve end-use customers.

The CLEC Coalition argued that §283.051(a) prohibits imposition of any fee other than the access line fees established under §283.055 on a CTP that has installed facilities within a public ROW and that is providing telecommunications services within such municipality. The CLEC Coalition asserted that allowing municipalities to impose additional compensation on pass-through lines would render §283.056(f) ineffectual, would undermine the existence of this blanket authority, and would run contrary to the

express language in §283.056(f) which recognizes that pass-through lines are not part of the basis for the calculation of compensation for usage of the ROW by CTPs.

Municipalities

TML argued that §283.056(f), the provision of HB 1777 cited in the proposed rule, is intended to apply to a CTP providing local exchange service in the city in which that CTP is using public ROWs. TML maintained that the entire focus of traditional city franchising practices and of HB 1777 was upon telecommunications companies that provided local service and §283.056(f) merely carries out that tradition. TML contended that when local service was provided, compensation for use of public ROWs was based upon the telecommunications revenues from local service, and subsection (f) merely identifies certain lines within the realm of local service that are not to be counted as access lines.

TML maintained that CTPs that do not provide local exchange service in a city do not pay access line charges on the lines that pass through the city and are not exempt from city licensing fees because they are not subject to HB 1777. TML argued that such CTPs are not authorized to use city ROWs for free and traditionally must pay a franchise fee or license fee usually based on linear-foot charges as rental for the occupancy and use of the ROWs. TML asserted that the proposed language contained in subsection (f)(5) correctly states how HB 1777 should be interpreted. TML argued that "lines that pass through a city but do not terminate at an end-use customer's premises should not be counted as

access lines. Instead, those lines are outside the purview of HB 1777, and the city is entitled and required to make linear foot compensation or similar requirements for the placement of such lines."

Houston agreed that access lines should be counted in, and attributed to, the municipality in which the end-use customer is located. However, it contended that HB 1777 was never intended to address the issue of pass-through line compensation because the scope of the bill was limited to establishing a uniform method of compensation by CTPs for municipal ROW based on access lines.

TCCFUI asserted that license agreements for ROW use by companies not providing service to customers within a city existed prior to HB 1777 and that there were no instructions from commission staff to include such fees in the base amount. TCCFUI stated that the companies' filings affirmed that the lines at issue are not access lines, are not used to provide local exchange service, and are therefore outside the scope of HB 1777. TCCFUI asserted that the companies are mistaken in arguing that there should be a subsidy for such lines by allowing free ROW use for such lines.

Plano argued that, based on the references in Texas Local Government Code §283.002(1) to providing services to end-use customers within "the" (and not "a") municipality, pass-through lines clearly do not fall within the definition of "access line" under Chapter 283 of the Texas Local Government Code. Plano asserted that if pass-through lines fail to meet the very definition of "access lines" established by HB 1777, then it would require

an unfathomable stretch of the imagination to suggest, first of all, that those lines even fall within the purview of HB 1777 and, secondly, that the compensation a municipality receives from CTPs with lines that meet the definition of "access line" would constitute "full compensation to a municipality for all of a CTP's facilities located within a public right-of-way."

Plano stated that in a recent letter opinion issued in Project Number 23557, *Forum to Address Municipal and Provider Complaints*, commission staff rejected an argument made by MCImetro that, "as a certificated telecommunications provider (CTP), the access line charges it pays to municipalities should constitute full compensation." Plano further contended that commission staff also rejected MCImetro's argument that compensation it pays under Chapter 283 constitutes the only amount to which cities are entitled, regardless of whether the access lines in question fall within HB 1777. Plano argued that although the lines at issue in that case were interexchange lines, these same arguments have been made repeatedly by CTPs with regard to all lines. Plano explained that CTPs have asserted that, because they are CTPs and because they pay compensation to a municipality somewhere in the State of Texas, they are exempted from compensating the municipality through which they pass without providing local exchange telephone service under Chapter 283. Plano contended that the commission has determined that some lines (i.e., interexchange, cable, and wireless) do not fall under Chapter 283 because they do not meet the definition of "access lines," and that the commission has further acknowledged that, for those lines, compensation continues outside the framework of HB 1777. Plano asserted that pass-through lines do not meet the definition

of "access lines" under Chapter 283 and thus are subject to compensation outside the framework of HB 1777.

Plano argued that based on the assumption that HB 1777 was intended to be revenue neutral, cities were instructed by the commission to calculate their base amounts using franchise revenues received from telecommunications companies in calendar year 1998. Plano asserted that a city's base amount did not include license revenues because cities were told that the lines for which licenses were being obtained did not meet the definition of "access lines" and therefore were not to be included in the base amount. Plano contended that cities understood that the access lines related to the franchise fees used to calculate the base amount would be divided into the base amount either through a ratio or percentage in order to determine how the burden of the base amount would be allocated across the three categories of access lines. Plano maintained that compensation from pass-through lines was not included in cities' base amounts under Chapter 283 specifically because such lines did not meet the definition of "access lines" under Chapter 283. Plano argued that if the commission adopts the proposed amendment to §26.465, the commission would have included access lines without having included the compensation related to those access lines, and that, as a result, cities' revenues will be reduced, and the goal of revenue neutrality would be destroyed.

Plano contended that from the language of the commission Order adopting §26.463 at its October 21, 1999 Open Meeting, it is clear that the commission did not intend to include compensation in the base amount from providers whose access lines would be excluded

from the provisions of HB 1777 because such lines did not meet the definition of "access line." Plano maintained that the commission specifically excluded lines belonging to IXCs, cable providers and wireless providers because they did not meet the statutory definition of "access lines" under HB 1777. Plano argued that, as a result, the commission intentionally did not include compensation received by municipalities from those lines because, by including such compensation but excluding the access lines, "the burden of compensating the municipality for use of the ROWs would be shouldered inequitably by ILECs and CLECs." Plano asserted that if the commission now adopts the proposed amendment (which would establish that pass-through lines qualify as "access lines" under Chapter 283) but not include the compensation that cities received for those lines pursuant to alternative compensation mechanisms, a result similar to what would have happened in the IXC, cable and wireless provider scenario would ensue.

Irving commented that its understanding regarding pass-through lines was that the pass-through lines that were in existence in 1998 and prior were not to be counted in the base amount calculation. Irving stated that this was the instruction of the commission staff at that time, as Irving understood it.

Commission Response

The commission's position is that pass-through lines, lines that pass through one municipality to reach an end-user in another municipality, allow the delivery of local

exchange service. Therefore, municipalities receive full compensation for pass-through lines in the municipal fee, because pass-through lines are "access lines," as defined in Texas Local Government Code §283.002(1). The commission notes that this rule amendment does not address all items under HB 1777. The commission intends to address additional pass-through issues in a subsequent rulemaking. As set out in §283.002(1), an access line may be a "switched transmission path . . . that allows the delivery of local exchange telephone services," a "termination point or points of a nonswitched telephone or other circuit," or a "switched transmission path . . . used to provide central office-based PBX-type services." As articulated by the State of Texas, and clearly set out in §283.056(f), there is simply no room in the language of the statute to allow additional compensation to be required for "other" access lines located in the public ROW under ordinances or franchise agreements that are disallowed under HB 1777. Such an artificially complicated process undermines the intent of creating a non-discriminatory, competitively neutral, uniform method for compensating municipalities for the use of the ROW that is administratively simple for municipalities and telecommunications providers. Moreover, subjecting access lines that pass through a municipality to the historic franchise/ordinance process discontinued by HB 1777 contradicts the clear language of the law.

The theory that an access line can be broken down into its component parts according to municipal boundaries and then subjected to multiple access line fees was explicitly disallowed by the Legislature. HB 1777 took into consideration the interconnected nature of the complex telecommunications infrastructure serving the rural and urban

cities of Texas. Because an access line may reach an end-use customer after being transported from a synchronous optical network (SONET) ring in another city, or an access line serving the end-use customer may require transport between two or more central offices, or any number of other alternative transport combinations, HB 1777 addressed the treatment of this transport portion of the access line. For example, as set out in §283.002(1)(B), an access line "may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service." Because an access line may utilize numerous types of transmission media, the designation of interoffice transport or other transmission media as a separate access line, subject to an additional access line fee, would subject some end-use customers to duplicate or multiple assessment of access line rates. This discriminatory result was both anticipated by the Legislature and expressly prohibited.

The persistent theory that pass-through lines are not access lines because the CTP does not deliver local exchange within the specific municipality is contrary to the express language of the statute. The statutory definition of "access line" is the determining factor in the classification of such pass-through lines. The access line definition in §283.002(1)(A) has three subparts, (i), (ii), and (iii). In (i), an access line is "each switched transmission path . . . extended to the end-use customer's premises within *the* municipality, that allows the delivery of local exchange telephone services within *a* municipality . . . ." Under (ii), an access line is also "each termination point or points . . . identified by and provided to, the end-use customer for delivery of nonswitched

telecommunications services within *the* municipality." Section (iii) describes the third type of access line as "each switched transmission path . . . used to provide central office-based PBX-type services…within *the* municipality." Municipalities rely upon the use of the article "the" as emphasized in the foregoing sections, for the proposition that an access line is only an access line insofar as it serves that specific city; an access line crossing municipal boundaries to serve an end-user in a neighboring municipality would, therefore, fall out of the category of access line and out of the HB 1777 framework altogether, thereby allowing a municipality to impose any compensation methodology upon this "new" category of line it may choose. However, the commission would note that subpart (i) also defines an access line in terms of allowing "the delivery of local exchange telephone service within *a* municipality." The mere use of the article "the" cannot be determinative of this issue in light of the very specific wording throughout HB 1777. While it is true that the statute explicitly exempts interoffice transport or other transmission media that do not terminate at an end-use customer's premises from the definition of access line, it does so to prevent the inappropriate result of duplicate or multiple assessment of fees. Under §283.002(1)(B), an access line may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service. To count and assess compensation separately on every piece of the complicated network infrastructure that eventually terminates at an end-use customer's premises, would invariably result in assessing duplicate or even multiple access line rates on that end-use customer. Furthermore, §283.056(f) expressly states that "the compensation paid under this chapter constitutes full compensation to a

municipality for *all* of a certificated telecommunications providers' facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation." Accordingly, the commission does not consider the choice of the article "the" to limit an "access line" to be within HB 1777 only when that line serves a designated customer within the boundary of any single municipality.

The commission also specifically agrees with the concept that the fee-per-access line compensation methodology established under HB 1777 and the total fees paid to a municipality thereunder are a proxy for the compensation formerly received by the municipality under the franchise regime in place prior to the enactment of HB 1777. Many cities were paid on a flat-fee basis or a percentage of gross receipts basis. Even where some municipalities had changed to a fee-per-access line compensation basis, an access line was not necessarily defined the same way as it is defined in HB 1777. But because a municipality's total 1998 franchise revenues from multiple sources, such as fees or in-kind services, were consolidated into one pot and then redistributed over access lines under the HB 1777 compensation methodology, a one-to-one correlation between access lines and municipal fees is unnecessary to ensure that a city receives adequate and appropriate compensation for use of the public ROW by CTPs. This is not "free use" of the ROW, but instead usage fully compensated under the HB 1777 regime.

The commission appreciates WorldCom's expressed concern as to what is included in the term "other transmission media." The commission relies upon the Legislature's express language used under Texas Local Government Code §283.056(f). To the extent that the phrase refers to lines used to deliver local exchange service, the commission understands this language to mean any telecommunications transmission line that does not terminate at an end-use customer's premises for the provision of local exchange service.

The commission disagrees with the position that compensation based on telecommunications revenues from the local service should be determinative of the calculation. While acknowledging that prior to HB 1777 some cities' franchise agreements were based upon revenue values, the commission points out that HB 1777 changed the compensation regime and made it uniform statewide. The commission relies on the four-corners of the statute to conclude that the Legislature has determined that, going forward, the municipal compensation for use of the public ROWs is to be recovered from the end-users of access lines.

The commission disagrees with the assertion that it provided improper instructions to the municipalities regarding the methodology of the 1998 municipal base amount calculation. The commission presented all municipalities with the same accurate documentation and information. The commission provided the following to ensure correct calculation of base amount by all municipalities: (1) numerous well-attended workshops held across the state in conjunction with TML throughout 1999; (2) individual calls and conference calls conducted by commission staff; and (3) mail-outs to every municipality in the state that

included directions to the website for the "INSTRUCTION PACKET FOR FORM FOR CALCULATING RIGHTS-OF-WAY COMPENSATION AND PROGRAM FOR CALCULATING RIGHTS-OF-WAY COMPENSATION." The forms themselves were also located on this website, as well as contact information on a commission representative assigned to answer questions.

Contrary to Plano's assertion that the commission's decisions regarding long-distance lines are inconsistent with this proposed amendment, the commission has been entirely consistent in addressing these two separate issues that have been sufficiently distinguished based upon the legislative intent represented in HB 1777. The commission disagrees with Plano's argument that the adoption of the proposed amendment to §26.465 would contradict the approach espoused by the commission in the October 21, 1999 Order adopting §26.463. The commission further disagrees with Plano's argument that it is contradicting itself on the issue of pass-through lines. The lines discussed in the October 21, 1999 Order and in the opinion in Project Number 23557 are long-distance, long-haul lines that are clearly not designated for the delivery of local exchange service and are therefore governed by the long distance license agreement framework in municipalities. As explained in the foregoing sections, pass-through lines, on the other hand, are clearly used to allow the delivery of local exchange service and are therefore access lines included in the HB 1777 framework. While industry may be seeking to cloud this issue by designating long-distance lines as pass-through lines within the meaning of this proposed amendment, the commission maintains its stance that long-distance lines are not within the language or intent of HB 1777. Consistent with this

understanding, the commission identified fees related to long-distance lines in municipal applications and discussed such items with each city individually to determine whether compensation from long-distance lines was being included in the base amount. To have included such compensation would not only be contrary to HB 1777, but would have resulted in the subsidization by local exchange customers of long-distance customers' franchise fee payments. The commission has not been inconsistent in this approach.

The commission disagrees with TML's assessment that the proposed amendment to §26.465(f)(5) may allow CTPs to avoid counting as access line those lines that pass through a city but do not terminate at an end-use customer's premises within that municipality. The provisions existing under §26.463(c) and (d) maintain that the franchise revenue for these lines was included in the municipal base amount under the HB 1777 framework. Further, Texas Local Government Code §283.055(j) and §283.056(f) and the existing language in §26.465(d)(1)(C) specifically provide that if a transmission path crosses more than one municipality, CTPs must count the line only in the municipality where the end-use customer is located. Clearly, pass-through lines that deliver local exchange service are within the HB 1777 framework, as they were included in the 1998 base amount, but are not to be actively counted by CTPs in each crossed municipality in a quarterly access line count report. This concept is already included in existing §26.465(f)(1). Because the proposed amendment to §26.465(f) may confuse the issue inadvertently, the commission strikes the proposed amendment to proposed §26.465(f).

The commission makes no change to §26.465(d) and adopts the subsection as proposed.

Historical ROW Compensation Issues

Parties submitted comments regarding the historical background on ownership and management of the public ROW.

Industry

SWBT asserted that a municipality's power lies in its ability to supervise the use of the right-of-way, including the authority to assess and collect reasonable fees for the cost of that supervision. SWBT also suggested that this power of supervision now rests with the commission, pursuant to Texas Local Government Code, Chapter 283. SWBT emphasized that the Texas Legislature determined that ROW fees based on access lines provide the best method of compensation to municipalities from CTPs. On that basis, the commission set the amount of those fees. SWBT concluded that municipalities are not entitled to extract compensation beyond that expressly set forth in Chapter 283 and established by the commission.

SWBT emphasized that municipalities do not own public ROWs, including those located within municipal borders. SWBT reflected upon the history of municipalities' responsibility to manage the public ROW and noted that while municipalities have been authorized to manage the public ROW and are authorized to recover reasonable

administrative costs of performing that managerial function, the municipalities are not authorized to "rent" the State's property, including the public ROW. SWBT suggested that the cities are now collecting fees in excess of administrative costs, and SWBT questioned the lawfulness of those fees. SWBT argued that the law has not changed to authorize municipalities to enhance collections further. Upon this basis, SWBT also disputed the municipalities' argument that the municipalities are giving away a valuable public interest "for free." SWBT concluded that if the municipality lacks power as a sovereign to exclude CTPs from public ROWs, then the municipality does not have authority to impose fees and other restrictions that would flow from that power. SWBT stated that municipalities have never had the right to exact tribute for a transiting CTP's use of the right of way and, thus, are not forced to give anything away under Chapter 283 or under the commission's rules.

At the public hearing, SWBT clarified its position, explaining that it is not challenging whether cities can receive compensation, but rather is questioning if cities can require compensation under the circumstances described in the proposed rule. SWBT characterized the cities' position as requiring the collection of a fee whenever public property is put to private or commercial use of any kind. SWBT maintained that ROWs are not city property but rather State property.

Municipalities

During the public hearing, the Coalition of Cities rebutted SWBT's comments by providing examples, providing a historical summary, and referencing Texas case law in support of its position that cities have authority to receive value-based compensation, control their ROWs, and promulgate police power. The Coalition of Cities conceded that its comments might not be appropriate in the context of the public hearing because they relate to matters previously reviewed in the context of the HB 1777 legislation. Likewise, the Coalition of Cities commented that this is not the forum to make decisions regarding the legitimacy of cities' receipt of value-based fees because the Legislature made these decisions regarding appropriate compensation.

Commission Response

Consistent with the express language of the statute in Texas Local Government Code §283.056(c), a municipality may exercise police power-based regulations in the management of the activities of CTPs within a public ROW, but only to the extent that such regulations are reasonably necessary to protect the health, safety, and welfare of the public. Although SWBT and the Coalition of Cities provided extensive and detailed discussions regarding the ownership of the public ROWs, the arguments of SWBT and the Coalition of Cities are outside the scope of this rulemaking. The question of ownership of the public ROWs is not at issue; to the extent that ownership was ever in question, the Legislature, in authorizing municipalities to retain the power to exercise

police power-based regulations and to receive compensation for use of the ROWs, appears to have addressed this question in 1999. HB 1777 provides the legislative directive regarding compensation and use of the ROW. This rulemaking specifically contemplates and implements that legislative directive. Issues regarding the legitimacy of the Legislature's decision and the legality of ROW ownership are outside the scope of this rulemaking and, therefore, are more appropriately addressed in a different forum.

Legislative Intent of HB 1777

Parties submitted comments regarding the consistency of the proposed amendment with the policies and purposes of HB 1777.

Municipalities

Plano asserted that the proposed amendment to §26.465 fails to consider the provisions found throughout Texas Local Government Code, Chapter 283 and violates the purpose and intent of HB 1777. Plano argued that Texas Local Government Code §283.001 clearly states that the policy of the State of Texas is to remove the barriers to entry for CTPs, to increase competition, and to ensure that municipalities receive fair and reasonable compensation for the use of public ROWs within the municipality. Plano contended that because Chapter 283 contains other references to CTPs that provide telecommunications services *within* the municipality, the compensation scheme created under HB 1777 was intended to apply to CTPs providing local exchange telephone

service within the particular municipality in which the access lines are located and not merely within a municipality in the State of Texas. Plano argued that cities are entitled to receive compensation from pass-through CTPs through mechanisms other than the access line fees established by Texas Local Government Code, Chapter 283.

TCCFUI contended that the preamble of HB 1777, Texas Local Government Code §283.001, sets out the policy of the state and the purpose of the bill. TCCFUI reiterated that the policies of the state are to encourage competition, reduce barriers, ensure no competitive advantage between providers and reduce uncertainty, while ensuring that municipalities retain authority to manage the public ROWs and receive compensation for the use of public ROWs.

TCCFUI listed the six purposes of the law and argued that the proposed amendment to §26.465 violates each and every purpose of that law. First, TCCFUI maintained that the proposed amendment to §26.465 would fail to meet the objective of being administratively simple for municipalities and telecommunications providers because it would allow any company to claim it falls under the exception provided by the proposed amendment to §26.465, and that each city would have to do investigative work to find out whether the company's claims are true within that city, thus becoming more complex than the current situation, with the new complexity alone defeating the purpose of HB 1777. Next, TCCFUI argued that the amendment would not be consistent with HB 1777 by virtue of allowing free use of public ROW. Moreover, TCCFUI asserted that allowing a few affected telecommunications companies free use of the ROW in selected cities would

be far from competitively neutral or non-discriminatory. TCCFUI characterized the amendment as creating a situation inconsistent with the burdens placed upon a municipality, by allowing the very company that is causing a problem to not pay for the burdens that it has created. The proposed amendment would also not provide for any compensation for use of the ROWs within the communities burdened by companies not offering services within a city, such that these communities are burdened by those companies' facilities in the ROW and their citizens receive no benefit from those facilities, while the companies receive a benefit from free use of the public ROWs. Finally TCCFUI contended that the amendment would not provide for fair and reasonable compensation for the use of public ROWs, because increasing the number of lines to be counted and divided into the base amount would have the effect of diluting the base amount, and diluting municipalities' revenues, and because revenues previously received from "pass-through" companies, not considered as CTPs because they did not provide service within the municipality, were not included in the cities' base amount.

TCCFUI maintained that HB 1777 is replete with references to payment for the use of the ROW by companies that use the ROW. TCCFUI asserted that HB 1777 clearly applies only to companies providing services within a municipality; otherwise the company falls outside of its provisions, citing Texas Local Government Code §283.051. TCCFUI argued that it strains the English language and is not the every day or common sense reading of that phrase to say that §283.051 means that a company paying any city can escape its obligations to every other city whose ROW is used.

TCCFUI contended that the title of Texas Local Government Code §283.052, "Effect of Payment of Right-of-Way Fees to Municipality," is premised upon paying fees to the municipality whose ROWs a company wishes to use, and that there is no room for an interpretation that allows a company to not pay fees to a city whose ROWs are being used.

TML stated that Texas Local Government Code §283.001 sets out the policy and purpose of the bill, which is clearly that cities are to be compensated reasonably for use of ROWs. TML referenced §§283.002, 283.051(a), 283.054(c), 283.055(b), and 283.056(a)(1) to assert that there is a demonstrable clear intent on the part of the Legislature to limit the application of HB 1777 to CTPs that are providing local exchange service within the cities in which the CTPs are using and occupying ROWs. TML explained that the statutory provisions demonstrating the overall intent of HB 1777 cannot be ignored and that to do so jeopardizes the stability that HB 1777 was intended to provide and which, until this rule was proposed, was being accomplished.

TML asserted that §283.056 should not be confused with CTPs who do not provide local exchange service. TML argued that "[s]ection 283.056(a)(1) clearly states that a city may not require a CTP to pay compensation, other than the access line fees authorized by §283.055, *for the right to use a public right-of-way to provide telecommunications services in the municipality* and may not require a CTP to provide any services or facilities *for the right to use a public right-of-way or to provide telecommunications services in the municipality*" (emphasis in original). TML further opined that every

subsection and provision of §283.056 addresses either a city's right of or prohibition against regulation and collection of compensation with regard to a CTP providing local exchange service in the city, and that to pluck subsection (f) from §283.056 and base the proposed rule upon it is to take it out of context in violation of well-established rules of statutory construction. TML declared that when construing the intent of a law, the courts do not consider parts of the law in isolation without considering the rest of the statute and that this is so even when the court is not seeking to determine legislative intent. TML further argued that, assuming that §283.056(f) creates ambiguity, then it is not proper for the commission to simply ignore the rest of the statute in order to give effect to one interpretation of that subsection and that it is imperative that the entirety of HB 1777 be examined in order to determine the correct meaning of §283.056(f) within the context of the entire statute. TML opined that upon doing so, it becomes evident that the proposed amendment to §26.465 ignores the true purpose behind HB 1777.

The Coalition of Cities contended that the language in Texas Local Government Code Chapter 283 does not apply to a CTP that is not providing telecommunications services within a municipality, and that, otherwise, if the CTP has one end-user customer in one small city in rural Texas, the CTP can pass through the other approximately 1,000 cities in Texas without any compensation. The Coalition of Cities argued that to construe HB 1777 in this manner is not a proper reading of its words or of its intent as it was adopted by the Texas Legislature in 1999.

The Coalition of Cities argued that it is contrary to statutory construction to ignore the clear statutory language. The Coalition of Cities contended that Government Code §311.021 provides that in construing a statute, "the entire statute is to be effective" and that the "public interest is favored over private interest." The Coalition of Cities asserted that CTPs that do not provide telecommunications services in the city are outside the purview of HB 1777 in those cities and the commission has no authority to address the type of compensation those "pass-through" providers pay to cities for use of the ROWs. The Coalition of Cities maintained that typically the kind of compensation those providers have paid in the past has been a linear-foot charge.

Garland asserted that the proposed revisions to §26.465 run counter to the legislative intent of HB 1777. Garland argued that pass-through lines are outside the parameters of HB 1777, and therefore owners of such lines must compensate the municipality for use of the ROWs in a manner determined by the municipality, usually on a linear-foot basis. Garland stated that it is clear from §283.001(a)(4) and §283.052(a) that the access line fees and the statutory authorization for use of ROWs replace fees and franchises themselves. Garland argued that the new access line fees, which replace franchise fees, are only part of the fair and reasonable compensation due to the municipalities for use of public ROWs by CTPs. Garland argued that HB 1777 did not replace non-franchise agreements or municipal licenses required for the use of ROWs by companies that do not transact business within the city. Garland stated that historically, such companies were required to obtain agreements or licenses to traverse the city, and the municipality charged a fee for use of the ROWs, usually on a linear-foot basis. Garland added that

such companies were also subject to ROW ordinances. Garland argued the need for the separate treatment of owners of these pass-through lines continues today. Garland argued that if any CTP is allowed to use public ROWs without the payment of fair and reasonable compensation, then the policy of the state, as expressed in §283.001, has been subverted. Garland argued that Chapter 283 does not preempt municipal fee requirements for providers, certificated or non-certificated, who are not providing telecommunications services within the city. Garland stated that free use of the ROW by anyone is not contemplated by HB 1777, and is not permitted by the Texas Constitution.

Industry

AT&T argued that cities' claims that they did not agree to a non-access line exemption is irrelevant. AT&T maintained that statements made by an individual legislator after the enactment of a statute may not determine legislative intent. AT&T asserted that the same concept applies to an interested party, and statements as to what was intended or to what was "agreed" cannot be given legal relevance. AT&T maintained that if the statute is clear and unambiguous, extrinsic aids and rules of construction are inappropriate and the statute is to be given its plain and common meaning. AT&T asserted that HB 1777 expressly defines "access lines" as involving end-user terminations and expressly excludes interoffice transport and other non-end-user lines from the definition of access lines, and therefore, non-access lines are excluded from the requirements in §283.051 and §283.055 that fees be paid on the number of access lines a CTP has in a municipality.

AT&T argued that, even if the rules of statutory construction were applied, the same conclusion would result, as application of the Code Construction Act confirms that so long as the service provider is a CTP, the ROW usage is governed by HB 1777 and a city cannot require more.

AT&T opined that construing HB 1777 so as to impose extra compensation requirements on CTP pass-through lines, as the cities' construction of HB 1777 entails, would have several consequences. It would: (1) render Texas Local Government Code §283.052(a) and §283.056(f) ineffectual; (2) not produce a just and reasonable result; (3) be unreasonable in light of the stated purpose of the statute; (4) not favor the public interest; (5) increase the end-use customer's bill; and (6) decrease the availability of competition.

AT&T argued that limiting cities to fee compensation for all CTP users of ROW, including pass-through lines, is consistent with the Code Construction Act. AT&T contended that the Code Construction Act provides that, in construing a statute, whether it is considered ambiguous on its face, a court may consider among other matters the: (1) object to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision. AT&T maintained that when applied to HB 1777, each of these statutory construction aids further indicates that cities' position is without merit (*see* Texas Government Code Chapter 311, Code Construction Act).

The CLEC Coalition disagreed with the cities' position that proposed §26.465 violates the stated policies of the Texas Legislature and the express purpose of Chapter 283. Instead, the CLEC Coalition believed that the proposed amendment merely restates and clarifies the law as stated in §283.056(f) and is therefore entirely consistent with the policies and purposes of Chapter 283. The CLEC Coalition relied upon the six policies enumerated by the Legislature at the time Chapter 283 was enacted and argued that the proposed amendment does implement such policies. The CLEC Coalition argued that the proposed amendment: (1) properly implements §283.056(f), encourages competition in the provision of telecommunications services, and makes clear that pass-through lines are not subject to additional municipal fees; (2) reduces barriers to competition because payment of fees to municipalities before a CTP begins service to end-use customers is a significant economic barrier to entry; (3) ensures that providers of telecommunications services do not obtain a competitive advantage or disadvantage in their ability to obtain use of the public ROWs because a competitive advantage is not provided to one CTP over another with respect to ability to obtain use of the public ROWs; (4) fairly reduces the uncertainty and litigation concerning franchise fees because the clarity provided by the proposed amendment reduces uncertainty and obviates the need for city-by-city litigation of this issue in disparate forums; (5) retains municipal authority to manage public ROWs within the municipality to ensure the health, safety and welfare of the public because the proposed amendment does not disturb a municipality's authority to exercise its police power-based regulations and whether a CTP is installing pass-through facilities or installing service laterals, the CTP is subject to the police power-based regulatory

authority of the municipality; and finally, (6) enables municipalities to receive from CTPs fair and reasonable compensation for the use of public ROWs within the municipality because Chapter 283 provides that municipalities receive access line fees and nothing more from CTPs. Access line fees, in the aggregate, provide fair and reasonable compensation to a municipality for use of the public ROWs by all CTPs, and the proposed amendment clarifies these compensation limitations and gives full effect to Chapter 283. The CLEC Coalition believed that the proposed amendment assures that municipalities do not exceed the statutory cap that has been placed on the level of compensation that may be collected by them.

The CLEC Coalition also articulated the six purposes of Chapter 283 that were identified by the Legislature and argued that the proposed amendment to §26.465 fulfills, rather than violates, each of those stated purposes. The CLEC Coalition commented that the proposed amendment is: (1) administratively simple for municipalities and telecommunications providers because it makes clear that CTPs are subject to one uniform fee based on the number of access lines within a municipality whereas imposition of additional fees on pass-through lines would be duplicitous and not administratively simple; (2) consistent with state and federal law because the proposed amendment restates the law in §283.056(f); (3) competitively neutral; (4) non-discriminatory because it clarifies that all CTPs pay ROW compensation on an access line basis, assures that the ROW compensation scheme is applied to CTPs on a competitively neutral and nondiscriminatory basis, and fulfills the expressly created single uniform method for ROW compensation that is to be applied in a competitively

neutral and nondiscriminatory manner, thereby complying with legislative intent by preventing multiple compensation schemes to be imposed on CTPs; and (5) consistent with the Legislature's determination that ROW fees based on access lines provide fair and reasonable compensation to municipalities; therefore, under Chapter 283, municipalities are not entitled to impose fees in addition to the access line fees.

Commission Response

The commission disagrees with the arguments that the amendment to §26.465 is contrary to the letter and intent of HB 1777. Both Chapter 283 and §26.465(d) are unambiguous. The commission virtually restated the statutory language into this proposed amendment, thus clearly capturing the intent of the statutory provisions. The commission fully considered each of the policies and purposes of this statute, as stated in Texas Local Government Code §283.001. The rule amendments are an accurate reflection of the statute and follow the intent as articulated within the four-corners of the statute. The arguments that the commission's interpretation of the statute is contrary to the legislative intent of the bill are unsupported by any documentation or secondary authority, such as material legislative history. Accordingly, the argument by the cities that the statute does not reflect their intentions is not an effective argument against the unambiguous language of the statute as constructed by the Legislature. In the absence of documentation, these arguments regarding their intentions are simply not legally relevant. The commission agrees with the CLEC Coalition's detailed analysis of the reasons that the proposed amendment to §26.465 meets the intent of HB 1777. The commission disagrees with the

concept that HB 1777 did not contemplate pass-through lines, as §283.056(f) clearly refers to pass-through lines.

The commission again emphasizes that the lines subject to this proposed amendment are access lines that pass through a particular municipality to provide service elsewhere. Pursuant to the definition of access line, an access line may be either a switched transmission path or a non-switched transmission path. Long-distance lines are not within HB 1777 and, as has been stated by this commission since adoption of its initial rules in 1999, long-distance lines are not access lines and, therefore, continue under the existing per linear-foot or other compensation arrangements currently in place.

The compensation framework of HB 1777 is based upon the payment of monthly fees by end-users. The bill explicitly acknowledged in §283.056(f) that, to reach an end-user, an access line might take on the nature of interoffice transport and may require the use of other transmission media that do not terminate at that end-use customer's premises. However, under §283.002(1)(B), an access line may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service. To count and assess compensation separately on every piece part of the complicated network infrastructure that eventually terminates at an end-use customer's premises, would invariably result in assessing duplicate or even multiple access line rates on that end-use customer. In fact, the greater distance a customer is from the central office, the larger the fee. The impact such an approach would have upon

rural customers would effectively render telephone service out of reach. Such an approach would not only run contrary to Texas' long-standing support for universal deployment of telephone service but would completely circumvent the words, the intent, and the spirit of HB 1777. Accordingly, the commission makes no modification to §26.465(d) in response to these comments and adopts provision, as proposed.

Challenges to Constitutionality

Parties submitted comments regarding the consistency of the amendment with the Texas Constitutional provisions which prohibit gifts of public property to private corporations.

Municipalities

Garland reiterated the initial comments of these parties that the proposed revisions to Rule §26.465 have no basis in the law, are contrary to the letter and intent of HB 1777, and are, in fact, unconstitutional. Garland asserted that the proposed revisions to §26.465 violate the Texas Constitution. Garland asserted that the language of HB 1777, as codified in Chapter 283 is unambiguous on the point that ROWs are valuable assets of municipalities, and that their use may not be granted without charge. Garland argued that ROWs are subject to the constitutional requirement that municipalities may not grant or loan any thing of value to a private person.

TML argued that "If adopted, this amendment will authorize telecommunications companies to lay lines and construct other facilities within city ROWs without compensating the city in which the facilities are placed, provided that the company placing such facilities does not provide local exchange service in that city." TML contended that such a result is the exact opposite of the express policy and purpose of HB 1777, threatens the constitutionality of HB 1777, and simply defies logic. TML asserted that "to construe §283.056(f) to require CTPs to use ROW for free will make HB 1777 unconstitutional by being violative of Article 3, Section 52 and Article XI, Section 3 of the Texas Constitution."

The Coalition of Cities argued that a CTP who passes through a city but who does not have any end-use customers in the city, not only may be charged ROW rental fees other than access line fees, but also should be charged such fees to be consistent with Texas constitutional requirements. The Coalition of Cities stated that it concurs with prior comments filed by TML that if rental fees are not recovered for use of the public ROWs, it violates the Texas constitutional provisions that a city is prohibited from giving public property to private parties without adequate compensation. The coalition of cities cited Texas Constitution, Art. III, §52 and Art. XI, §3 to support their position that both provisions prohibit gifts of public property to private corporations.

TCCFUI stated that adoption of the amendment to §26.465 requires granting free use of the ROW and sows the seeds for a finding of unconstitutionality of HB 1777. TCCFUI argued that a particular consequence of the proposed amendment to §26.465 would be

use of the public ROW in every city in Texas for one access line located in just one city in Texas. TCCFUI maintained that allowing the free use of public ROW within any city is both unconstitutional and inconsistent with HB 1777, as the Texas Constitution forbids giving away public property for private purposes. TCCFUI averred that those constitutional provisions are designed to forbid the kind of public subsidies, in the form of free use of the public ROW, contemplated by the proposed amendment, and that violation of the Texas Constitution is inconsistent with HB 1777.

Plano asserted that Texas Constitution, Article III, §52 prohibits, in part, gifts of public property to private corporations without adequate compensation. Plano maintained and agreed with the comments made by TCCFUI that the failure to recover use fees from pass-through CTPs constitutes a violation of that section.

Industry

AT&T asserted that the claim by municipalities that they are not being compensated for pass-through lines, which is invalid under Texas Constitution, Article III, §52 as a "free use" of public assets, is both factually and legally inaccurate, as cities are compensated, by the total amount of CTP end-user access line quarterly fees, for *all* uses of the public ROWs made both by end-user lines and by non-end-user lines. AT&T argued that HB 1777 does not provide that each specific ROW usage must have a specific amount of revenue associated with it, but instead provides a means of calculating an aggregate

amount of revenue designed to keep the cities whole on what they were receiving before the advent of local competition.

AT&T contended that the literal text of the Texas Constitution, Article III, §52(a), by its terms is not applicable to this situation, as it provides in relevant part that, "the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." AT&T maintained that the article does not generally prohibit "free use" of public assets, but instead prohibits the Legislature from giving to cities or other political subdivisions the power to lend credit or grant money or things of value to private entities. AT&T further asserted that HB 1777 does not authorize a city to lend credit or grant money or things of value to private entities, but that the Legislature expressly granted to CTPs the right to use public ROWs, including for non-end-user lines, and legal title to a municipality's streets technically belongs to the State. AT&T argued that the city controls the streets only as trustee for the public, and a city does not have any authority to grant, and is not granting, a CTP the right to use the ROW when the city grants a construction permit for a pass-through line -- because the Legislature has already made that grant. Instead, all the city is doing when issuing a construction permit is exercising part of the police power narrowly preserved by HB 1777. AT&T stated that, given the public interest in telecommunications service, the Legislature was authorized under the Texas Constitution to prohibit a city from imposing ROW fees on CTPs' pass-through lines.

Commission Response

The commission believes that it is not necessary to debate or determine the constitutionality of duly enacted laws. The rule is an accurate restatement of the statute as enacted by the Legislature. The commission's charter is to craft a rule that clearly and accurately implements the law as written. To the extent that parties believe the law, and therefore the rule, are unconstitutional, any potential remedy would have to be pursued elsewhere.

The commission disagrees that the rule provides for municipalities' grant or loan of an asset with value to a private person. AT&T accurately points out that HB 1777 is not premised upon compensation for each piece part of the network. In fact, HB 1777 expressly excluded certain types of facilities from compensation, including interoffice transport and other transmission media within the public ROWs that do not terminate at an end-use customer's premises, *even though those types of lines are not used in the calculation of the compensation*. However, these lines are not operating free of charge within the public ROWs. The termination point of the access line, at the end-use customer's premises, is both the point that is counted and that is subject to compensation. The components of the network that interconnect to achieve that termination are compensated through the eventual end-use customer on an aggregated basis. Because historical municipal franchise compensation has been reallocated and is now recovered over a different group, the end-use customers, those customers constitute the recovery vehicle for all compensation. Therefore, no public ROW is being granted or loaned

without charge. Rather, municipalities are compensated in accordance with the end-use customer framework as decided and developed by the Legislature.

Industry commenters have pointed out many times that a company seeks to maximize its revenues by utilizing each part of its network. A line that passes through a municipality today represents a company's future goal and commitment to seek customers at all points along the access line. Deploying infrastructure takes time, as does competitively seeking new customers. There is no business model that supports cities' fear that a single line will deliberately be built to cross every city in Texas to serve a single customer. In the current business climate, CTPs are seeking new efficiencies and economies of scale by increasing market share at every opportunity.

The commission makes no modification to §26.465(d) in response to these comments and adopts the amendment as proposed.

ARGUMENTS REGARDING LONG-HAUL ISSUES

Termination and Compensation Regarding Long-Haul License Agreements

Parties submitted comments regarding whether contracts or license agreements related to long-haul long distance lines are covered by the statute and whether, as such, §283.054 created a termination right as to contracts or license agreements for long-haul long

distance lines. Parties' concerns are addressed regarding the status of existing and future contracts.

Industry

SWBT focused on the point that the proposed amendment does not attempt to abrogate existing licensing agreements or other contracts between municipalities and CTPs. SWBT stated that CTPs that transit through municipalities were under no legal obligation to enter into agreements to access the public ROW for the installation or operation of telecommunications facilities. If CTPs chose to enter into agreements, the amendments proposed by the commission should not affect those agreements. Thus, concluded SWBT, there is no basis for the municipalities' claim that the proposed amendment will have a negative revenue impact.

SWBT also addressed the municipalities' position that the proposed amendments would change the nature of the relationships between CTPs and municipalities. SWBT reiterated the municipalities' position that some CTPs have traditionally paid franchise fees or license fees based on formulas developed by the municipalities. SWBT argued that those payments reflected contractual agreements rather than legal obligations under state law and went on to argue that, notwithstanding the existence of contracts between municipalities and some transiting-only CTP, municipalities do not have the authority to compel telecommunications providers to enter into contracts or pay tribute for the privilege of using the public ROWs to provide telecommunications service. SWBT

argued that the fact that some CTPs have entered into contracts in the past does not create the legal authority to require contracts in the future. SWBT requested the commission adopt the proposed amendment to §26.465.

AT&T opined that prior to HB 1777, Texas law was clear that providers had a statutory right to use ROWs for long distance without franchises and cities could not require franchise fees for long distance use, but to avoid delays of litigation, providers entered into "license" agreements with cities, which varied city to city.

Level 3 incorporated by reference those comments filed by the company on November 29, 2000, and reiterated its concern over the manner in which Texas' cities have interpreted HB 1777. Level 3 supported §26.465, believing the commission's proposed rules clarify the obligations and rights of the parties and eliminate many potential disputes concerning the use of the public ROW. However, Level 3 requested further direction from the commission. Specifically, Level 3 sought clarification on whether long-haul license agreements have any effect once a CTP establishes access lines and the CTP begins reporting and paying ROW fees according to the terms of HB 1777.

Level 3 stated that it continues to have disputes with municipalities over defunct long-haul license agreements. Level 3 explained that some cities, citing Texas Local Government Code §283.054(a), are demanding long-haul ROW payments in addition to access line fees. Level 3 noted that §283.054(a) provides that a CTP may elect to terminate existing obligations that arise from an executed ROW agreement or ordinance

by providing notice to the commission and the affected municipality by no later than December 1, 1999. Level 3 questioned what becomes of long-haul ROW agreements if a CTP did not have access lines prior to December 1, 1999, but subsequently establishes them.

Level 3 explained that it executed numerous long-haul agreements in order to obtain the right to construct its network on a "pass-through" basis, as well as local "franchise" agreements in municipalities where it planned to offer local services. Level 3 stated that in certain municipalities where the company initially executed only a pass-through agreement, it has subsequently installed local facilities and submitted quarterly access line reports and payments according to HB 1777. Level 3 believed long-haul license agreements should no longer have effect, regardless of the "opt-out" schedule of §283.054(a). Level 3 asked that the commission clarify that simply because a CTP did not have operational access lines that would trigger the application of HB 1777 as of December 1, 1999, it is not forever barred from the nondiscriminatory application of the HB 1777 mandate that payment based upon an access line count constitutes full payment for all usage of ROW in Texas.

The CLEC Coalition argued that if compensation is to be competitively neutral and nondiscriminatory, the commission cannot slice and dice CTPs based on past history, and since in today's competitive environment CTPs are providing integrated telecommunications services, they should be paying one uniform fee. The CLEC

Coalition argued that the cities' base amounts should be revisited to include license revenues.

McLeodUSA opined that the statute expressly provides that the access line fees will cover all the CTP's telecommunications facilities within the city's public ROWs. McLeodUSA cited Texas Local Government Code §283.056(f) and argued that the first sentence of this provision makes clear that the HB 1777 fees were intended to replace all fees that municipalities had received for use of ROWs by "telecommunications-related businesses," not merely businesses providing local exchange service, and the second sentence makes clear that the HB 1777 fees are to cover not only the use of ROWs for end-user lines themselves, but also for the interoffice facilities and other network infrastructure that is required to provide telecommunications services, but may not fall within the definition of an "access line."

McLeodUSA cited §26.463(c)(1)(B) and argued that it is, at best, unclear whether fees received under a long distance license agreement should have been excluded, or continue to be excluded, from the base amount, where the CTP has lines within the city that do meet the definition of "access line." McLeodUSA contended that whether a city could have included those fees in its base amount, and whether any increase in base amounts would be lawful, the statute itself is clear that a city is limited to collection of per-access-line charges for a CTP's use of public ROWs within the city for the provision of "telecommunications services," not merely local services.

McLeodUSA asserted that any other interpretation would be discriminatory and violate the competitively-neutral fee system that Chapter 283 was intended to create, and that any other interpretation represents an insurmountable and discriminatory burden for competitors that invested in and deployed network facilities in Texas before the Chapter 283 fee system was put in place and found themselves party to long distance license agreements in the process. McLeodUSA contended that separate payments, in addition to Chapter 283 fees, for use of public ROWs to provide long distance services would not be sought from a competitive carrier who constructs network facilities today within a city's public ROWs and uses those facilities to carry both local and interexchange traffic.

McLeodUSA contended that under Texas Local Government Code, Chapter 283, the only fees that a city is allowed to collect for the use of public ROWs to provide telecommunications services are the access line fees authorized by that chapter. McLeodUSA cited §283.056(a)(1) and asserted that this statutory prohibition on additional charges is not limited to a CTP's use of public ROW to provide local telecommunications services, but encompasses "telecommunications services" without limitation.

McLeodUSA requested the commission make explicit that a municipality may not collect fees from a CTP for use of public ROWs under a long-distance license agreement, or similar agreement, in addition to per-access-line charges under Chapter 283. McLeodUSA argued that cities may be expected to take the position that, even in its present proposed form, §26.465(d)(1)(C) merely provides that the per-access-line fee

constitutes full compensation for all of a CTP's facilities located within public ROWs, insofar as they are used to provide local exchange service. McLeodUSA recommended the following additional amendment to §26.465(d)(1)(C), ". . . the per-access-line fee paid by CTPs constitutes full compensation to a municipality for all of a CTP's facilities located within a public right-of-way and *used to provide any type of telecommunications services*, including interoffice transport and . . . ."

McLeodUSA stated that alternatively, it joins Level 3 in requesting the commission make explicit that a city may not enforce or collect fees under a long distance license agreement from a CTP that has established access lines within the city. McLeodUSA argued that where a CTP has lines within the city that do not meet the definition of access lines under Texas Local Government Code §283.002, the only fee that the city may collect from the CTP for the use of the ROW to provide telecommunications services in the city, whether they are local or long distance or both, is the access line charges under Chapter 283.

McLeodUSA argued that the attempt by certain cities to continue enforcement of so-called "long-haul" license agreements, executed prior to implementation of the Chapter 283 regime, against CLECs who now are using public ROWs within a city to provide both local and long-distance service is an issue that threatens to undermine the proposed language.

Municipalities

Houston stated that, beginning in November 1998, under its telecommunications ordinance, the city entered into non-LEC franchise agreements. In addition, Houston asserted that they have collected non-LEC telecommunications franchise revenues in excess of $1.6 million dollars during 1999 and $2.6 million dollars during 2000. Therefore, Houston stressed that the adoption of any rule that caused the loss of these revenues would have a fiscal impact on the city and cannot implement the intended revenue neutral design of HB 1777.

Houston offered the following clarifying language for proposed §26.465(d)(1)(C): "Nothing herein contained shall be construed to limit the right of a municipality to receive fair and just compensation for the use of its ROW by all telecommunications providers to only those amounts which a CTP serving customers via access lines within a municipality must pay to that municipality pursuant to Chapter 283 Texas Local Government Code." Furthermore, Houston proposed also amending §26.465(f) by inserting the above statement.

Houston stated that it opposed McLeodUSA's position. Houston stated that a company that was a long-haul company and now has access lines in the city should report and pay for the access lines and continue to pay for the long-haul business. Houston asserted that the non-LEC telecommunication franchise revenues that it discussed in comments refers to franchise revenue from agreements with IXCs.

Irving contended that it distinguishes between requests for permits by CTPs for facilities to deliver local service to end users and requests for permits from non-CTPs or for facilities that are not intended to deliver service to end users. Irving stated that it takes the requestor's intent to provide end-use service at the requestor's word and it does not ask for an estimation of how long it will take to begin providing service to end-use customers. Both Houston and San Antonio agreed that they handle permits in the same way as Irving.

San Antonio stated that prior to the state's adoption of HB 1777, it approved and executed several long distance licenses that were based on a per linear-foot charge, and which expressly prohibited the provision of local exchange service without further consent of San Antonio via a franchise agreement. San Antonio further contended that although HB 1777 expressly prohibits it from requiring a franchise, these agreements were negotiated in good faith and the per linear-foot fees generated from these agreements were not included in San Antonio's 1998 base revenue calculation. San Antonio argued that if it were to lose the ability to enforce these agreements, it would not be compensated for this use of public ROW, which would not result in a revenue neutral impact to the City of San Antonio.

San Antonio argued that, as defined by HB 1777, the term "certificated telecommunications provider" is narrow in scope, in that it is the authority given by the commission to provide local exchange telephone service. San Antonio contended that the

rules should utilize language that is reflective of this scope, specifically by not allowing companies to use their designation as a CTP to terminate these long distance license agreements. San Antonio further stated that HB 1777 only gave providers the right to unilaterally terminate franchises by December 1, 1999, not long distance license agreements. San Antonio opined that if the commission proceeds to adopt a new rule, specific language should be included recognizing the right to enforce per linear-foot long distance license agreements.

The Coalition of Cities argued that changing the compensation to include license revenues should occur by a change in the law rather than an interpretation of the law by the commission.

Commission Response

By its own words, HB 1777 relates to the provision of local exchange service. The provisions of Texas Local Government Code §§283.002(1)(A)(i), 283.002(2), 283.002(5), 283.006, and 283.051(b) clearly indicate that Chapter 283 is applicable to local exchange service and to nonswitched lines but not to switched interexchange lines. The statute clearly excludes lines covered under long-haul license agreements from consideration in the municipal base amount. Any other reading would require constant re-evaluation of the 1998 municipal base amount, which is clearly outside the intent of the statute. Texas Local Government Code §283.054(a) grants CTPs the option to

terminate a franchise agreement or obligations under an existing ordinance as of the effective date of the commission-adopted ROW fee rates.

The commission has consistently maintained this position since being delegated responsibility for developing rates under HB 1777. In the October 21, 1999 Order adopting §26.463, the commission stated, "The commission is persuaded that the base amount should not include fees from CTPs that are interexchange carriers, cable providers or wireless providers. Access lines belonging to IXCs, cable providers, and wireless providers generally do not meet the statutory definition of 'access lines' under HB 1777. If the commission were to include compensation from these providers, but exclude their access lines, based upon the statutory definition of 'access lines,' the burden of compensating the municipality for use of the ROWs would be shouldered inequitably by ILECs and CLECs. To obtain consistent results, it is appropriate to include only providers whose access lines meet the definition of access lines as defined by §283.002 of the Texas Local Government Code. Through this approach, the commission will ensure that the base amount is comprised of monies from the same providers over whose access lines these fees will be spread. Therefore, the commission revises the definition of base amount to exclude fees from IXCs, cable and wireless providers who may be CTPs, but whose lines do not meet the definition of access lines. Compensation from these providers will continue outside the framework of HB 1777." This portion of the Order is incorporated in the commission's adopted rules. Section 26.463(c)(1)(B) reads, "The base amount does not include compensation received from interexchange carriers, cable

provider or wireless providers, who may be CTPs, but whose lines do not meet the definition of access line under Texas Local Government Code §283.002."

The commission has continuously held that the option to terminate a franchise agreement or obligations under an existing ordinance as of the effective date of the commission-adopted ROW fee rates, related only to franchise agreements relating to the provision of local exchange service. Consistent with this position, as recently as April 23, 2001, in a letter discussing a dispute between a municipality and a provider, staff disallowed the late inclusion of license fees attributable to long distance lines in the municipal base amount. Commission staff contended that regardless of whether the telecommunications provider is certificated by the commission, under Chapter 283 and commission rules, long distance lines are excluded. Contrary to the assertion that the access line charges that a CTP pays to municipalities should constitute full compensation for all use of the public ROW, the statute and rules exclude long-haul lines from the framework. Allowing providers to include lines compensated under long-haul license agreements in this framework would subvert the intent of the law and the policy of the commission.

The commission provided the following to ensure correct calculation of base amount by all municipalities: (1) well-attended workshops held across the state in conjunction with TML throughout 1999; (2) individual calls and conference calls conducted by commission staff; and (3) mail-outs to every municipality in the state that included directions to the website for the "INSTRUCTION PACKET FOR FORM FOR CALCULATING RIGHTS-OF-WAY COMPENSATION AND PROGRAM FOR

CALCULATING RIGHTS-OF-WAY COMPENSATION." The forms themselves were also located on this website, as well as contact information on a commission representative assigned to answer questions. Within the definitions section of the instructions packet is the statement: ". . . Base Amount . . . does not include compensation from interexchange carriers, cable providers, or wireless providers, who may be CTPs, but whose lines do not meet the definition of access line under Local Government Code §283.002." There can be no doubt that these instructions, and the painstaking efforts put forth by the commission to communicate them, clearly define the requirement to exclude fees from long-haul license agreements from the base amount calculations.

Despite certain superficial similarities, access lines passing through a city to provide local exchange service in another municipality are not the same as long-haul or long distance lines. Compensation issues regarding long-haul and long distance lines are outside the scope of the statute, outside the scope of these proposed rule amendments, and outside the scope of this proceeding.

The commission has steadfastly found that long-haul long distance lines are not within the purview of HB 1777. Accordingly, contracts or license agreements related to such long-haul long distance lines are not covered by the statute. As such, §283.054 did not create a termination right as to contracts or license agreements for long-haul long distance lines. In response to parties' concerns of the status of existing and future contracts, the commission, through this rule or previous rules, has taken and continues to

take no position regarding the status of contracts governing long-haul long distance lines, as they are outside the purview of the commission.

Statutory Deadline of License Agreements

Parties submitted comments as to whether the rule provides for any extension of the deadline in which CTPs could terminate franchise agreements.

Irving stated that it did not understand that there was any consideration of extending the statutory deadlines for ending a license agreement and read all comments on such as being outside the scope of comments. Houston argued that CTPs do not have a springing right to reject a long-haul agreement if their business plan has changed.

McLeodUSA clarified that it is not seeking a springing right to extend the time in which it could terminate agreements, but instead recognition that its license agreements were terminated in a timely manner.

Commission Response

The commission makes no changes in response to these comments. The commission has not considered any extension of the deadline in which CTPs could terminate franchise agreements. This issue is outside the scope of this proceeding.

Issuance of Permits by Cities with Outstanding Long-haul License Disputes

Parties submitted comments regarding the issue of cities' rights, or lack of, to withhold ROW permits based on outstanding disputes with CTPs.

Industry

The CLEC Coalition maintained that some municipalities have required payment of up-front fees before they will issue a construction permit until the CLEC can prove to them that they will in fact be serving end-use customers. The CLEC Coalition noted that several cities have denied construction permits to CTPs unless the CTP agreed to pay up-front per linear-foot and further noted that the issuance of the construction permit was conditioned upon annual per linear-foot fees until the CTP demonstrated that it was serving end-use customers within this municipality. The CLEC Coalition stated that some CTPs that have been denied construction permits are new telecommunications service providers who entered the telecommunications service market after the passage of the Federal Telecommunications Act of 1996 (FTA 96) and others are newly certificated to provide local exchange service but are not new to the telecommunications service arena. The CLEC Coalition noted that some CTPs in this position might be former interchange carriers (IXCs) or competitive access providers (CAPS) who are expanding their existing networks. Regardless, the CLEC Coalition noted that whether the CTP is new to telecommunications or whether the CTP previously provided long distance services, the CTP is building or expanding a network that typically spans several

contiguous cities. The CLEC Coalition argued that networks are designed and engineered to reach as many persons as possible and therefore backbones are built in rings before laterals are installed to end-use customers' premises. The CLEC Coalition concluded that Chapter 283 is clear in its prohibition of additional fees and indicated the proposed amendment to §26.465 properly interprets Chapter 283 and should be adopted.

Level 3 requested that the commission mandate that cities cannot terminate CTPs' ROW rights if disputes arise that relate to issues being addressed in the proceeding.

McLeodUSA requested the commission make explicit that a city may not deny a CTP access to public ROWs, and may not delay or deny issuance of permits to a CTP to work in public ROWs, on the basis of a claim for money owed to the city, so long as the CTP is current in its Chapter 283 per-access-line fee payments to the city.

McLeodUSA posited that, in addition to setting forth the fees, a CTP is obligated to pay a city for use of its ROWs. McLeodUSA contended that Chapter 283 limits a municipality's ability to deny a CTP's permit requests. McLeodUSA cited §283.056(d), and argued that under the plain language of this provision, a city is required to promptly process a CTP's applications for permits provided that they are valid and administratively complete. McLeodUSA contended that the fact that a CTP may not agree to pay long distance license fees under license agreements that the CTP genuinely believes to have been terminated pursuant to Chapter 283 does not make the CTP's permit applications any less valid or administratively complete. McLeodUSA asserted that a city must not be

permitted to hold up a CTP's use of ROW, which may be required in order to conduct necessary provisioning and maintenance work, to gain leverage over the CTP related to a disputed claim for long distance license fees or other monetary claims.

McLeodUSA argued that Chapter 283 does not permit a city to diagnose the type of telecommunications service to be provided through a CTP's use of the public ROWs and to impose separate licensing (and fee) requirements where that use includes long distance service, and that the only regulatory requirements that a city may impose for a CTP's use of public ROWs to provide telecommunications service are the nondiscriminatory issuance of a construction permit and the competitively neutral enforcement of police power regulations to the extent reasonably necessary to protect public health, safety, and welfare.

McLeodUSA requested language for clarification from the commission that a city (1) may not delay or deny a CTP's application for a permit to use public ROWs to provide telecommunications services on the grounds of nonpayment of long distance license fees and (2) may not impose a separate license requirement for a CTP's use of public ROWs within the city, based on the fact that the particular facilities for which the CTP seeks access to the public ROWs will be used, in whole or in part, to provide telecommunications services other than local exchange service.

Municipalities

San Antonio requested that any proposed rule relating to penalties specifically recognize the local government's right to deny permits based upon a relevant failure of the CTP to operate lawfully in the public ROW, so long as denials are based upon a uniform, non-discriminatory process. San Antonio agreed that all penalties should be applied uniformly to all CTPs, and anticipated the challenge of determining when it can and cannot deny a ROW use permit as a form of penalty. San Antonio argued that although HB 1777 gives a CTP the "right" to use the ROW, this "right" is limited by the city's ability to police and manage its ROW. San Antonio contended that the ability to rightfully deny a permit based upon a failure of a CTP to abide by city laws, policies or agreements of the city is founded upon the city's ability to manage its ROW. San Antonio discussed that a situation in which it might consider denying a permit as a form of penalty could be when a CTP has failed to abide by a valid license agreement. San Antonio stated that "this begs the following question: if a CTP has an existing valid long distance license agreement and breaches that agreement, can the city deny a ROW use permit to that CTP?"

Commission Response

As addressed in the commission's response to comments regarding proposed §26.469, the Legislature expressly reserved to municipalities those police power-based regulations in

the management of a public ROW. Please see the commission's response to comments on proposed §26.469 for further elaboration.

§26.469, Public Right-of-Way Fees and Penalties

The new §26.469, as proposed, clarified the definition and applicability of fees and penalties as these relate to municipal compensation and ROW management. However, the commission withdraws this section.

GENERAL SUPPORT AND ARGUMENTS FOR §26.469

The following parties filed written comments in support of the commission's proposed new §26.469: State of Texas, TSTCI, WorldCom, Level 3, Verizon, AT&T, CLEC Coalition, and Sprint. WorldCom, Verizon, and AT&T expressed concerns with the proposed language as written.

State of Texas

The State of Texas supported the commission's proposed new §26.469 because it clarifies applicability of fees and penalties for use of the ROWs and stated that the provision will promote healthy competition by appropriately addressing the issues of nondiscrimination and the rights of municipalities to manage the public ROW.

Industry

TSTCI generally supported the draft rule, as written. TSTCI stated that new §26.469 provides a valuable clarification that will prevent current and future confusion as to what fees and assessments fall under the umbrella of the municipal access line fees.

WorldCom commented that in §26.469(c), "fees" are defined as compensation for the use of the public ROW but that, technically, application fees are not for the use of ROW. Rather, they are to compensate the municipality for the costs of processing the application or registration and are paid whether the ROW is actually used. WorldCom noted that in §26.469(d), application fees are specifically excluded and suggested that the intent of the subsection may be clarified if the definition of "fees" is expanded to include application and registration charges. In addition, WorldCom noted that the defined terms "Fees" and "Penalties" are not capitalized consistently throughout §26.469. WorldCom suggested modification to §26.469(d)(1), line 1, to change the term "any compensation" to "fees" and to add "registration" to the list of prohibited fees. The commission understands WorldCom's comment to suggest that §26.469(d)(1) would then read that a municipality may not require a CTP to pay fees other than the per-access-line franchise fee authorized by Texas Local Government Code §283.055, for the right to use a public right-of-way to provide telecommunications services in the municipality. In accordance with Texas Local Government Code §283.056, such prohibited fees include, but are not limited to, application, franchise, license, permit, approval, excavation, inspection, registration, or other similar fees or charges.

With regard to §26.469(d)(2), WorldCom recommended that in line 2, "for municipally owned poles" be added after "pay pole rental fees." As well, WorldCom expressed concern that it is not clear as to what the term "special assessments" includes in the context of §26.469(d)(2). WorldCom commented that in §26.469(e), penalties do not go far enough in establishing guidelines, and the company recommended that basic due process requirements should be included in all penalty sections. Although WorldCom did not provide any suggested language to be added to the rule text, it did provide an example: "before a penalty is assessed there should be written notice describing what action or failure to act gave rise to the proposed penalty. There should be an opportunity to cure as well as a stated right to an administrative appeal. The description of the alleged breaches or defaults which gave rise to the penalties must be clear and unambiguous and the penalties must be reasonable and appropriate to the breach or default."

Level 3 incorporated by reference those comments filed by the company on November 29, 2000, and reiterated its concern over the manner in which Texas cities have interpreted HB 1777. Level 3 supported §26.469, believing that the commission's proposed rule clarifies the obligations and rights of the parties and will eliminate many disputes concerning the use of the public ROW. Level 3 wanted access to their networks protected even if disputes arise with cities. Level 3 asked that the commission prohibit municipalities from terminating CTPs' ROW rights if disputes arise that relate to issues being addressed in this proceeding. Level 3 stated that CTPs have invested vast amounts of capital constructing their networks and must be assured access to those networks and

related ROW, that CTPs must have commercial certainty of the operating environment in the state of Texas, and that if an impasse occurs between a city and a CTP, the CTP must be guaranteed the opportunity to bring the issue before the commission for resolution without fear that access to the municipal ROW, and indirectly its network, is in any way impaired.

Verizon reiterated comments made in their November 29, 2000 filing, stating that criminal or civil penalties for violation of the ROW management ordinances may conflict with HB 1777's "full payment" requirement to cities for use of the public ROW as provided in Texas Local Government Code §283.056, which states that the compensation paid under this chapter constitutes full compensation to a municipality for all of a CTP's facilities located within a public ROW. On the other hand, Verizon argued that if it is determined that criminal or civil penalties can be assessed, these penalties could only be assessed when a municipality's policy is written and publicly available. Section 26.469 was proposed by the commission to state that to the extent elsewhere authorized by law, a municipality may assess penalties against a CTP for violations of a municipality's public right-of-way management ordinance or other written municipal policy. Verizon suggested adding to subsection (e)(1): "that are reasonably necessary to protect the public's health, safety and welfare and are not unreasonable or discriminatory." Verizon stated that this language is contained in Texas Local Government Code §283.056(c) and should be the minimum threshold for adoption of any ROW management ordinance or other rules by a municipality.

AT&T supported §26.469, but stated that the proposed rule fails to limit the amount of penalties that can be assessed against an alleged violator, which have ranged from $500 to $1000 per day for even the slightest and most harmless infraction of a ROW management ordinance. AT&T suggests it would be beneficial if the rule provided guidance to municipalities on the maximum level of penalties and the types of infractions for which penalties are reasonable and justified. AT&T suggested that a $500 to $1000 per day penalty for an administrative oversight infraction, such as providing 28 days notice instead of 30 days notice, is unduly burdensome and unlawful. AT&T stated the rule also fails to provide guidance as to when a violator has a right to due process of law or when such rights should be observed. AT&T noted that many municipal ROW management ordinances do not require the officials to provide the alleged violator notice of the alleged violation, an opportunity to cure the alleged defect, or an opportunity to be heard prior to assessing the fine or penalty. AT&T noted that the by-product of such discretion increases the likelihood and potential for the arbitrary and capricious application of fines and penalties, which could lead to expensive litigation and numerous complaints to the commission. AT&T recommended the rule require municipalities to provide alleged violators: (1) reasonable notice of the alleged violation; (2) a reasonable opportunity to be heard; (3) a reasonable opportunity to cure the alleged violation; and (4) the right to appeal a fine or penalty after it has been assessed. AT&T stated that such requirements would protect the integrity of the ROW management process and would promote better relations between the ROW user and the governing municipality.

The CLEC Coalition urged the commission to adopt the proposed amendment to §26.469, stating that it is consistent with Texas Local Government Code, Chapter 283, it provides clarification, and will serve to avoid future confusion concerning fees and penalties. The CLEC Coalition suggested that the term "franchise" be deleted from proposed §26.469(d)(1) and (e)(3).

Sprint commented that the new §26.469 represents a fair standard in which to interpret the intent of HB 1777, makes clear which access lines are subject to the provisions of HB 1777 and fairly identifies what fees and penalties can and cannot be assessed by cities. Sprint asserted that the proposed rule strikes a fair balance between municipal interests and the enhancement of competition.

GENERAL OPPOSITION AND ARGUMENTS AGAINST §26.469

The following parties filed written comments in general opposition to the commission's proposed new §26.469: SWBT, Coalition of Cities, TML, TCCFUI, Houston, Plano, and Garland.

Industry

SWBT requested the commission not adopt proposed new §26.469 because it is neither necessary nor appropriate to implement the policy of Chapter 283, nor is it needed to ensure competitively neutral, non-discriminatory, or reasonable enforcement of

requirements enacted by municipalities under their authority to manage the public ROWs. SWBT argued that Chapter 283 does not contain a definition for "fees" or "penalties." Therefore, the commission's action in assigning definitions to these terms could result in an inadvertent expansion of the municipal authority that is granted by Chapter 283. SWBT suggested that proposed new §26.469 actually endorses municipalities' intent to view the term "penalties" broadly, thereby resulting in assessment of additional fees for a CTP's presence in the public ROWs. SWBT recommended that because this is an inappropriate topic under implementation of HB 1777, and because authority to assess any such penalties would be based upon other areas of the law outside of Chapter 283, the commission should not adopt §26.469.

SWBT referenced Texas Local Government Code §283.053 which describes the items that shall not be included in the calculation of a municipality's "base amount," including "pole rental fees, special assessments, and taxes of any kind, including ad valorem or sales and use taxes, or other compensation not related to the use of a public right-of-way." SWBT asserted that just because these items are not to be included in the "base amount," it does not automatically provide the commission with the jurisdiction to grant municipalities the right to require payment of these fees, as stated in proposed §26.469(d)(2). SWBT made three points: (1) to the extent municipalities have the right to exact any of these stated fees, the right exists elsewhere in the law and is not the subject of Chapter 283; (2) Chapter 283 does not authorize the commission to sanction municipal penalties, and to the extent a municipality is authorized to impose penalties for non-compliance with municipal ordinances, the authority exists elsewhere in the law and

is not a proper subject for commission rules; and (3) §26.469(e), as proposed, expands on the limitations of §283.056(c). Therefore, SWBT argued that the commission should not adopt §26.469. Rather, SWBT urged that both the penalties and the enforcement of the penalty against a CTP, as well as all ROW management regulations, must be lawful and reasonable, as well as competitively neutral and nondiscriminatory.

Municipalities

The Coalition of Cities agreed with and adopted the comments as filed by the TML, TCCFUI, Plano, Garland, and San Antonio in their opposition to the new proposed §26.469. The Coalition of Cities asserted that the proposed rule is outside the scope and intent of HB 1777, that the commission was not granted any jurisdiction over cities in HB 1777 to authorize or not authorize such penalties - nor to set standards for penalties. The Coalition of Cities stated that most of the proposed rule is simply a repeat of the current statute and therefore unnecessary. The Coalition of Cities stated that it was specifically opposed to the entire subsection (e), as it seems to equate "compensation," as referred to in HB 1777, with "penalties." The Coalition of Cities stated that "penalties" are not in any way a form of compensation for use of the ROW and argued that HB 1777 only addresses compensation for ROW use. The Coalition of Cities asserted that Chapter 283 does not even allude to penalties and that penalties are imposed by cities under other specific statutory authority such as Texas Local Government Code, Chapter 54, Enforcement of Municipal Ordinances, and under general police powers authority. The

Coalition of Cities gave several examples of when a city may impose a penalty on a provider and the form a penalty may take.

The Coalition of Cities stated that they know of none of their members who charge prohibited fees. The Coalition of Cities argued that, as the access line fee is structured to replace any franchise fees or permit fees that were charged for "use of the public rights-of-way" prior to Chapter 283 and as the Base Amount for municipalities excluded "pole rental fees, special assessments, taxes of any kind, including ad valorem or sales and use taxes, or other compensation not related to the use of the public right-of-way," those fees and compensation may still be charged. The Coalition of Cities asserted that this statutory language is reflected in the proposed rule at subsection (d)(2), and that it agrees with this provision. The Coalition of Cities maintained that the prohibited fees do not bar generally applicable fees that would generally apply to either private property or public property construction. The Coalition of Cities argued that, in light of these provisions, Austin continues to assess an annual "environmental review" fee. The Coalition of Cities asserted that federally mandated environmental standards require the City of Austin to stringently enforce rules enacted to protect the watershed from runoff associated with excavation on private and public property, and that this environmental review is required regardless of whether excavations are performed on public or private property. The Coalition of Cities maintained that this fee has no association with a CTP's "use of the ROW" and that this fee helps defray the cost of enforcing these environmental regulations and is also intended to pay for City staff time used in the development of environmental regulations compliance strategies with construction entities. The Coalition

of Cities contended that, as a "cost recovery" tool, the environmental review fee was never a part of the "compensation received for use of the ROW" equation established under HB 1777. The Coalition of Cities also stated that a fee may be charged for the service of expediting the permitting process.

The Coalition of Cities argued that cities may also recover cost from contractors or owners for any damage to public property arising due to construction in the ROW, all in accordance with the indemnity sections of §283.057. The Coalition of Cities asserted that some cities have considered, and may be implementing, charges to recover additional costs to the city caused by all street utility cuts for repaving the streets. The Coalition of Cities maintained that, while no one would argue that if a street cut is not done properly, the city could require that the CTP repair it or in the event they did not repair it, the city could repair it itself and receive a reimbursement from the CTP for this repair cost. The Coalition of Cities contended that the same holds true if a street has multiple street cuts on it and needs to be repaved earlier than expected. The Coalition of Cities argued that those additional costs for the repaving may be recovered from those who caused it, and that Chapter 283 does not prohibit such cost recovery. The Coalition of Cities stated that while it did not agree with all reasons given by SWBT in its opposition to the proposed §26.469, it did agree with SWBT's comments that Chapter 283 does not refer to the application of penalties, that such a topic of penalties is not an appropriate topic under implementation of HB 1777, and that the commission should refuse to adopt the new §26.469. The Coalition of Cities stated that it disagreed with the comments filed by

AT&T, WorldCom, and Verizon that the commission should establish more details and further restrictions on cities as to penalties.

TML argued that proposed §26.469 would accomplish little or no purpose. TML argued that subsections (a)-(c), (d)(2), and (e)(4) merely re-state legal principles or definitions already contained in the law or Chapter 283. TML contended that subsection (e)(1) purports to grant authority to cities to impose penalties that the cities already have by statute. TML asserted that all of proposed §26.469 should be deleted except proposed subsection (d)(1). TML supported subsection (d)(1) as clearly stating its position that a municipality may not charge fees for the right to use ROWs other than access line fees for the right to use ROWs to provide telecommunications services in the municipality. TML argued that this is the correct interpretation of HB 1777 and that the converse is that a city may charge fees other than access line fees for the right to use ROWs by entities that do not provide telecommunications services in the city.

TML argued that proposed §26.469 demonstrates a lack of experience with municipal issues, and may exceed the commission's authority. TML argued that subsection (e)(2) seems to reverse the federal and state statutory requirements for competitive neutrality and non-discrimination respecting restrictions on the use of public ROWs. TML asserted that subsection (e)(2) apparently requires misconduct in the public ROW by CTPs to be competitively neutral and non-discriminatory in order that cities may sanction them accordingly, because a city's imposition of sanctions for misconduct provides specific and general punishment for past actions and deterrence against future misconduct. TML

argued that "Such penalties will, and must, single out the perpetrator for discriminatory treatment. To suggest that cities must impose penalties on a non-discriminatory and competitively ignores and reverses the purpose of imposing penalties."

TCCFUI argued that proposed §26.469 is unnecessary, and that, although it may be designed to support the assessment of penalties by municipalities, it instead opens the possibility for future erroneous arguments that the commission intended to change the meaning of the statute and expand the role of the commission. TCCFUI contended that the law does not require or support the provisions of the new rule. TCCFUI maintained that proposed §26.469(e)(1) exceeds the commission's authority by purporting to grant sanction power to the cities that the cities already have by statute. TCCFUI contended that §26.469(e)(2) perverts the federal and state statutory requirements for competitive neutrality and non-discrimination respecting restrictions on the use of the public ROWs into a requirement that sanctions for misuse of the public ROW or for misconduct by CTPs in the public ROW be competitively neutral and non-discriminatory. TCCFUI asserted that this approach ignores the fact that as a matter of law, in the exercise of its police powers after adequate due process, a city can and should impose sanctions for misconduct by CTPs that are intended to provide specific and general deterrence as to future misconduct, as well as compensation for past misconduct and that any such sanctions will inevitably, and justifiably, single out the miscreant for discriminatory treatment and could make it difficult or even impossible for the wrong-doer to compete in the future.

TCCFUI requested that §26.469 not be adopted. TCCFUI urged the commission not to diminish or take away local control of ROW management, which TCCFUI argued is the only way a ROW can be properly managed. TCCFUI contended that HB1777 confirmed local management of the ROW as a state policy, and the complexity and variety found in Texas localities demands local solutions to unique problems. TCCFUI asserted that, to the extent the commission wishes to support the ability of local governments to manage the ROW and assess penalties for violations of ROW ordinances, a simple statement of support would be preferable. To the extent not inconsistent herein, TCCFUI supports the positions of TML and the Coalition of Cities.

Houston stated the proposed new §26.469 appears unnecessary and in its current form provides no new guidance toward implementation of HB 1777 that is not already clearly present in HB 1777. Houston suggested that the proposed new §26.469 be deleted in its entirety.

Plano asserted that proposed new §26.469 is unnecessary, as the language of the proposed rule that addresses fees is merely a restatement, almost verbatim, of the provisions of Texas Local Government Code §283.056, and does not set any "standards for fees" as stated in the preamble to the proposed rules. Plano further asserted that the language of the proposed rule that addresses the assessment of penalties by a municipality is unnecessary and does not implement any portion of HB 1777. Plano argued that HB 1777 governs compensation for use of public ROWs and not the payment of penalties for the violation of city ordinances. Plano asserted that while it has been

authorized to adopt rules implementing HB 1777, the commission has not been authorized to adopt rules addressing the ability of a municipality to enforce its ordinances. Plano argued that Texas Local Government Code §54.001 provides general enforcement authority for rules, ordinances, and police regulations to all municipalities including the imposition of penalties for violations of ordinances. Plano opined that there is no need for a commission rule authorizing municipalities to enforce any ROW management ordinances and impose penalties therefor. Plano supported the comments of TCCFUI that, if the commission desires to support the ability of municipalities to manage the ROWs and assess penalties for violations of ROW management ordinances, a simple statement of support is preferable.

Garland agreed with the comments filed regarding the proposed new rule that such rule is both unnecessary and unnecessarily confusing. Garland supported the comments filed in this respect by TML, TCCFUI, Coalition of Cities, San Antonio, and Plano. Garland suggested that §26.469(c) requires some clarification in order to avoid confusion. Specifically, Garland contended that, as the Texas Attorney General recently opined, Texas Local Government Code, Chapter 283 applies only to municipal regulations and fees imposed on and collected from CTPs. Garland, therefore, endorsed that the proposed rule be clarified to only apply to access line fees imposed on CTPs. Garland expressed concern that this proposed section, as written, could be interpreted to require municipalities to impose uniform fees on CTPs, electric providers, gas providers, cable television companies, and water and sewer companies. Garland suggested adding language so that the provision would read, "Fees – Compensation from CTPs to a

municipality for the use of public ROW. Fees are uniformly applied to all similarly-situated CTP ROW users." Garland also stated the proposed rule is not necessary in order to give municipalities the authority to impose penalties for violations of municipal ordinances, as such authority already exists independently of HB 1777 and the rules adopted thereunder. Garland states, however, that since there are potential conflicting interpretations of municipalities' authority in this regard, the city supports §26.469(e) regarding the imposition of penalties on CTPs for violation of ROW management ordinances and other written municipal policies. Garland submitted that any municipal ordinance qualifies as a "written municipal policy" under this provision, and penalties are assessable against CTPs for any violation of any municipal ordinance.

Commission Response

Based on comments, the commission chooses not to adopt §26.469. The goal of the proposed rule was to address the issue of competitive neutrality and unreasonable or discriminatory regulation. In attempting to distinguish "fees" from "penalties," the commission sought to define previously undefined terms. As the comments reflect, there is a wide range of interpretation of these terms. To the extent elsewhere authorized by law, a municipality may exercise its police power-based regulation. Chapter 283 did not change that existing authority.

The commission in no way intended to diminish or take away local management of the public ROWs, as suggested by TCCFUI's comments. Moreover, the expressed concern

of municipalities that §26.469 would have this unintended result is sufficient reason for the commission to withdraw §26.469 at this time. Therefore, the commission does not adopt §26.469.

UNIFORM PUBLIC ROW MANAGEMENT ORDINANCE

In the April 6, 2001 issue of the *Texas Register*, comments were solicited as to whether the commission should promulgate rules or create guidelines for a uniform public ROW ordinance to be adopted by municipalities in Texas.

GENERAL SUPPORT OF A UNIFORM PUBLIC ROW ORDINANCE

The following parties filed written comments in support of the commission promulgating rules or creating guidelines for a uniform public ROW ordinance to be adopted by municipalities in Texas: SWBT, WorldCom, CLEC Coalition, and Level 3.

Industry

SWBT asserted its support for uniform guidelines, arguing that such guidelines would be time and resource saving, especially for smaller municipalities; would assist in resolving disputes between municipalities and CTPs regarding the permissible level of ROW management authority; and could provide a forum for education and negotiation between municipalities and CTPs regarding their respective needs and limitations. SWBT

disputed the municipalities' opposition to a uniform ordinance or guidelines as causing confusion due to differing authorities and needs. SWBT argued that this position by the municipalities is refuted by the fact that municipalities are sharing management guidelines and entire ordinances. SWBT provided its concept of the municipalities' concern as being who develops the guidelines rather than whether the guidelines exist. SWBT requested the commission to initiate the process to promulgate rules or guidelines to establish the perimeters for ROW management ordinances.

SWBT articulated its position as to the explicit limitations that HB 1777 places on municipalities' power to regulate the use of the public ROW and pointed out that in the same act, the Legislature limited municipal power at the same time it established a uniform mode of compensating municipalities for their administration of a CTP's use of the public ROW. SWBT provided an example to illustrate why it believes that the commission has authority to impose limitations on municipal ordinances through the adoption of commission rules. SWBT clarified in the public hearing that it did not suggest that there should be a uniform ordinance. However, SWBT believed that there are some common issues and that efforts by city staff and by their providers would be aided if the commission were to promulgate guidelines in the form of rules that would be maximums and minimums. SWBT expressed that these would not be compulsory and a city would not have to adopt anything.

WorldCom supported the concept of commission promulgation of rules or creation of guidelines for uniform public ROW ordinances to be adopted by municipalities pursuant

to their police powers and consistent with Texas Local Government Code, Chapter 283. WorldCom stated that the promulgation of a uniform ROW management ordinance would eliminate disparate provisions that make it time consuming and complicated for CTPs to install facilities which traverse more than one municipality.

The CLEC Coalition supported the use of public ROW ordinances that are reasonable and that are applicable to all users of the public ROWs. The CLEC Coalition stated that both municipalities and CTPs would benefit if the commission developed certain limited standardized guidelines for ROW use ordinances regarding registration procedures, permit application procedures, evidence of insurance, and submission of as-built plans and if the commission explored the possibility of a centralized repository for evidence of insurance.

Level 3 argued that cities cannot be allowed to determine how much conduit a CTP may put in the ground. Level 3 contended that requiring cities to adopt uniform ROW ordinances will ensure that construction in city ROWs is allowed to proceed in a timely manner and on terms favorable to municipalities and the affected CTP. Level 3 maintained that a commission-ordered ROW ordinance would provide consistency. Level 3 asserted that any ordinance must relate to the city's control or use of its ROW, must not be used to supplement city coffers, and must be non-discriminatory and competitively and technically neutral.

GENERAL OPPOSITION TO A UNIFORM PUBLIC ROW ORDINANCE

The following parties filed written comments in support of the commission promulgating rules or creating guidelines for a uniform public ROW ordinance to be adopted by municipalities in Texas: TML, TCCFUI, Coalition of Cities, Plano, Garland, Houston, and San Antonio. Irving offered verbal comments at the public hearing.

Municipalities

TML asserted that the commission should not promulgate rules or create guidelines for a uniform public ROW ordinance to be adopted by cities in Texas. TML argued that any attempt to do so will provide the telecommunications industry with an opportunity to advocate positions and argument that are beyond the commission's authority to decide, will cost cities a great deal of time and expense to address, will burden the commission, and will interfere with the well-established authority of cities that is preserved in HB 1777. TML maintained that the details of ROW ordinances vary significantly from city to city based upon city type, home rule city charter provisions, local ordinances, geography, climate, geology, demographics, traffic considerations, infrastructure conditions, ROW capacity, and myriad other local factors. TML argued that by attempting to arbitrate and draft the ideal uniform ordinance, the commission would place itself in the business of deciding local issues, which it does not have the staff or responsibility to assume.

TCCFUI stated that there is no statutory support for a uniform ROW ordinance, no support from municipalities, and little or no support from telecommunications companies or industry groups for such an ordinance. TCCFUI stated that ROW management is a local concern and to establish a uniform ROW management ordinance would only create an ordinance that would be, at best, meaningless and could even endanger the public safety.

The Coalition of Cities stated that, while member cities have or will adopt individual ROW ordinances as they are beneficial to the cities and those excavating in the city ROW, it would oppose a commission rule requiring a ROW ordinance or guidelines for such an ordinance promulgated by the commission. The Coalition of Cities argued that §§283.001(b)(1), 283.056(c)(1)-(4), and 283.057 clearly preserve and reiterate the historic police powers of municipalities to manage the ROW. The Coalition of Cities contended that the few restrictions as to police power regulations in Chapter 283 are only as to a required business office, restriction on required reports, restriction on the inspection of business records and as to transfers and as to notice on emergency repairs, and that there is also a statutory indemnity. The Coalition of Cities stated that it agrees with the consensus of the comments at the workshop on this rule that there are numerous advantages to both cities and the industry in municipalities adopting ROW management ordinances. The Coalition of Cities maintained that, while it does not agree that the commission has jurisdiction to mandate such ordinances be adopted by cities and the Coalition of Cities would not support a rule requiring such an adoption by a municipality,

it would not oppose a commission policy statement that it would be advantageous to both the industry and to cities for cities to adopt such a management of the ROW ordinance.

The Coalition of Cities asserted that, while there may be certain broad common elements in such a ROW ordinance, the details will vary significantly from city to city, as cities are unique across Texas. The Coalition of Cities argued that, if the commission chose to promulgate guidelines or a list of suggested "standard" provisions, those guidelines or that list would be deemed to be an exclusive list of what constituted "reasonable standards." The Coalition of Cities maintained that in the event that a city had additional or different details in its regulations that were not on the commission's "approved" list, such regulations may be challenged using the commission "approved" guidelines as the basis of an argument that the regulation was improper or "unreasonable." The Coalition of Cities stated that some in the industry have suggested that the FTA 96 limits city authority in this area, but that this assertion is not correct. The Coalition of Cities argued that the federal law also preserved the cities' ROW management authority. The Coalition of Cities cited a Dallas federal court case in which the court provided examples of how a city may manage its ROW. The court also commented on municipalities' historic rights to management of the public ROW being preserved in Texas law. The Coalition of Cities asserted that while courts in other jurisdictions have also reviewed these issues under federal law in the few cases where federal law has preempted city ROW ordinances, it has been where they were either vague, allowed unbridled discretion to city officials, or the regulations were unrelated to the ROW usage. The Coalition of Cities added that additional municipal ROW authority is allowed for in Texas Utility Code §181.089. The

Coalition of Cities reiterated in the public hearing its opposition to a ROW ordinance or to a standard for ROW ordinances because, while cities do share their ROW ordinances, ordinances are specifically tailored to meet each city's needs, and are always changing to deal with their particular fact situation, particular geography, and particular density.

Plano argued that while there are numerous advantages to cities and industry in adopting ROW management ordinances and that while Plano itself has adopted a ROW management ordinance, Plano does not support a commission rule requiring cities to have a ROW ordinance due to the fact that it does not believe that the commission has jurisdiction to require such an ordinance. Plano contended that the ROW management needs of each city are unique to that city, and regulations that are appropriate for one city are not necessarily appropriate for another city. Plano applauded the commission for indicating on several occasions that it would not dictate the elements of cities' ROW ordinances, because by taking this approach, the commission recognizes the authority of cities to exercise their police power-based regulations in the management of the public ROWs as provided in Texas Local Government Code §283.001 and §283.056.

Garland stated that it believes a ROW ordinance is a reasonable and proper police power based management tool for Texas municipalities. Garland also asserted that the choices and decisions reflected in Garland's ordinance are exclusively within the authority of the City Council of the City of Garland and that nothing in HB 1777 diminished or restricted that authority. Garland concluded that the commission is without authority to either require that a municipality adopt a ROW ordinance or to dictate its contents. On this

basis, Garland urged the commission to decline to issue any rules or directives in this regard.

Houston reiterated its opposition to the suggestion of the commission promulgating a standardized ROW ordinance. Houston argued that promulgating such a standardized ROW ordinance would potentially: (1) contradict the purpose of HB 1777; (2) exceed the scope of the commission's mandate to regulate CTPs under HB 1777; (3) create confusion over the interpretation of HB 1777 without contributing finality; and (4) involve the commission in matters outside its jurisdiction and expertise. Houston stated that the legislature provides no mandate for a commission promulgated standardized ROW ordinance within the plain meaning of HB 1777. Rather, Houston maintained municipalities should retain their traditional role as manager of their ROW and better meet the individualized needs of each municipality's unique characteristics. Houston stated that HB 1777 simply does not express a clear legislative intent to expand the commission's responsibility into the area of drafting a standardized ROW ordinance. Houston therefore, opposed any action by the commission that would require municipalities to adopt a commission-promulgated form of standardized ROW ordinance.

San Antonio argued that it does not support the passage of uniform public ROW ordinance rules or guidelines and that these issues are better reserved to the local governments to decide the best practices in managing and policing their ROW. San Antonio contended that both the FTA 96 and HB 1777 specifically recognize ROW management as an issue for local control and cited to *BellSouth Telecommunication v.*

City of Coral Spring & Town of Palm Beach, Nos. 98-08232 and 99-14292 (11th Cir., filed May 25, 2001), which, it argued, supports local control of ROW management. San Antonio argued that its ordinance already accomplishes the goal of preserving its ROW management and police powers, while maintaining non-discriminatory treatment of CTPs.

Irving stated that it opposed guidelines.

Commission Response

The commission solicited comments regarding whether it should propose rules or guidelines discussing uniform municipal ROW management ordinances. Because municipalities strongly contend that any such rules or guidelines might infringe upon a municipality's police power-based authority, the commission will not issue guidelines regarding municipal ROW management ordinances at this time. The commission agrees that issues regarding ROW usage are both common among municipalities and unique to each municipality. The commission encourages CTPs and municipalities to work together in resolving these issues to mutually satisfactory solutions. The commission notes, however, that any police power-based regulation adopted to implement the provisions of Texas Local Government Code, Chapter 283 must be competitively neutral and may not be unreasonable or discriminatory.

CHALLENGE OF PREAMBLE ASSERTIONS

Leon Valley opined that the determinations offered in the preamble were incorrect because police power-based regulations cannot replace fees for use of ROW where a CTP is authorized by statute to run its cable through a city's ROW free of charge, even though the CTP does not provide end-user services within that city. Leon Valley argued that the retained right of cities to initiate legal action is hardly a useful right in that it suggests that the citizens should bear the double financial burden of having their collective private property taken by corporate entities and then having to pay again for litigation to attempt to regain that which should not have been taken from them in the first place. Leon Valley stated that the commission offered zero empirical data and made no claim to have sought input from any municipality to use in the development of the determination that the fiscal impact of pass-through lines rests on the expectation of a municipality for a revenue amount rather than on a true impact to that amount.

Leon Valley argued that it is difficult to understand the reasoning of the statement that adoption of the HB 1777 rules will in any way result in a "public benefit" in the nature of "more efficient use of the public ROW" that will come "as a result of enforcing the sections." Leon Valley contended that the commission offered zero empirical data to support the statement that some municipalities and CTPs may even experience an economic benefit due to the clarity, consistency, and uniformity imposed in the amended and new rules.

Plano argued that cities will see an immediate fiscal impact if pass-through lines are assumed to be "paid for" when a CTP pays municipal fees to some city under HB 1777 because some cities are currently, or were previously, receiving compensation for the pass-through lines from providers pursuant to other types of licenses or agreements and the revenue received under those licenses or agreements will simply vanish since it has not been, and will not be, included in cities' base amounts. Plano further maintained that pass-through lines create a burden on cities' ROWs that is not merely an expectation of a revenue amount, in that the construction of lines that pass through the public ROWs often results, just as with lines that will be used to provide local exchange telephone service, in damage to public infrastructure and facilities owned by other utility and telecommunications companies. Plano contended that the municipal fees received by cities represent a portion of the funds used to maintain the public ROWs and public infrastructure, and that by allowing certain CTPs to use public ROWs in certain cities without compensating the cities, the proposed amendment to §26.465 destroys the revenue neutrality, competitive neutrality, and non-discriminatory policies on which HB 1777 was founded.

Plano referenced the preamble statement that the proposed amendment will result in a more efficient use of the public ROWs, but argued that there is no explanation as to what is meant by that phrase or how the proposed amendment to §26.465 will actually accomplish that goal. Plano asserted that any conclusions respecting the impact of the proposed amendment to §26.465 on the efficiency of ROW use are without foundation—and therefore cannot be relied upon as a justification for the proposed amendment to

§26.465 —in the absence of any analysis of how telecommunication infrastructure installation, maintenance, repairs and other work impact competing uses of ROWs, particularly vehicular and pedestrian traffic and the exercise of the rights of peaceable assembly and free expression.

Plano stated that the proposed amendment to §26.465 would allow CTPs that pass through a city without providing local exchange service to citizens within that city to not compensate that city for the use of its ROWs. Plano asked if a CTP is not providing local exchange telephone service in a city, how could it be providing "greater accessibility to telecommunications services" to the citizens within that city or be "providing greater choice for telecommunications consumers?" Plano maintained that the only result from the adoption of the proposed amendment to §26.465 is that CTPs will be allowed by the commission to burden the cities' ROWs without paying *any* compensation to the city for their use of the ROWs—which is in direct contradiction to the policy of the state, set out in Texas Local Government Code §283.001. Plano asserted that Chapter 283 leaves ROW regulation policy decisions where they belong, with the cities, and the commission has no authority to interfere with municipal ROW policies so long as the policies are competitively neutral and non-discriminatory. Plano argued that there is no claim that the proposed amendment to §26.465 is necessary to correct city policies that violate federal or state telecommunication law limits on city restrictions regarding the use of ROWs by telecommunications providers. Plano opined that the proposed amendment to §26.465, which is purportedly based on policy considerations that are within the sole purview of cities, would exceed the commission's authority.

TCCFUI cited the statement "The public also benefits through more efficient use of the public ROW" and argued that the proposed change does not make more efficient use of the ROW, just free use by some companies and that no supporting data showing such efficiency is offered. TCCFUI argued that the comments in the preamble to the proposed amendment that cities will receive economic benefit are without merit. TCCFUI cited the statement "[s]ome Municipalities and CTPs may even experience an economic benefit due to the clarity, consistency, and uniformity imposed in the amended and new rules" from the preamble and argued that though some companies will experience an economic benefit, cities will not. TCCFUI stated that no city so burdened by construction and deployment of facilities will benefit under the proposed amendment, and that not only does the city not receive payment for the use of the ROW, but the city's citizens do not receive services. TCCFUI argued that the spurious prediction of possible economic benefit contradicts the prediction of the fiscal neutrality in the fiscal note accompanying the amendment's proposal.

TCCFUI cited the statement "[a]s a result of these decreased barriers to entry into the telecommunications market, telecommunications competition is likely to increase, thereby providing greater choice for telecommunication customers in Texas" from the preamble and argued that competition by multiple telecommunications companies was always more an unrealized promise and creature of available market financing. TCCFUI maintained that, except as a financial benefit to telecommunications providers and initial public offering (IPO) insiders, it was never about easy or free access to publicly financed

ROWs. TCCFUI stated that the public continued to suffer for increased competition to fill the ROW with fiber, whether services are ever provided. TCCFUI contended that companies digging frequently deprive citizens of utility services due to severing existing facilities in overcrowded ROWs.

In its March 19, 2001 correspondence, TCCFUI expressed its belief that the proposed rule probably has a substantial local fiscal impact requiring a Texas Work Force Commission local employment impact statement as required under Texas Government Code §2001.022. TCCFUI also believed that Texas Government Code §2001.024(a)(4)(A) requires a more detailed and better supported local fiscal impact statement, including discussion of the anticipated major costs of litigating the validity of the new rule. Finally, TCCFUI asserted that the commission staff's March 13, 2001 memorandum is devoid of any factual substantiation of the absence of fiscal impact.

Commission Response

The commission finds that comments regarding the preamble statements apply to both the adopted amendment to §26.465 and the previously proposed new §26.469, which is being withdrawn. With this in mind, the commission disagrees with these comments.

The commission disagrees with the assertions of Leon Valley, TCCFUI, and Plano that the proposed amendment will not result in more efficient use of the public ROW or provide public benefit. This efficient use of the public ROW can be divided into two

categories: efficiency through reduction of administrative costs and efficiency through optimization of the scarce resource of physical ROW space. In accordance with the Legislature's stated policies and purposes under §283.001, this amendment increases administrative simplicity and clarifies the equitable fee structure thereby reducing barriers to entry for CTPs seeking access to the public ROWs. The clarifying rule amendment informs all stakeholders, including the public, municipalities, and telecommunications providers, about the meaning of the statute. The efficiency gained through consistent interpretation and application of the law in itself constitutes a benefit for the public because it reduces administrative costs to all stakeholders, which includes savings to the rate-paying consumers. Moreover, reduced barriers to entry into the market leads to more CTPs being able to enter the market and use the ROW, thus leading to more efficient use of the scarce resource of physical ROW space due to economies of scale. The public will benefit through increased opportunity of competition in the telecommunications market due to optimization of ROW usage.

In contemplating the issues of economic benefit, the commission considered the various types, sizes, and unique challenges to various municipalities in the State of Texas. The commission specifically used the language "some municipalities . . . may even experience an economic benefit . . ." because "municipalities had various arrangements with CTPs prior to HB 1777" and "because HB 1777 provides uniformity for CTPs to gain access to all public ROW," therefore, "implementation of HB 1777 may have impacts that differ among municipalities." The stated policies and purposes of the statute apply across the entire state of Texas rather than to any particular municipality.

Consistently, the commission's position has been and is that the economic benefit will vary amongst municipalities. Some municipalities will gain revenue because, ultimately, the reduction of barriers to entry as clarified by the amendment to §26.465 will ease the additional deployment of facilities and create greater opportunities for the delivery of local exchange service. The increase in end-use access lines translates into economic benefit in the municipalities where those lines terminate.

The commission disagrees with TCCFUI that the prediction of possible economic benefit contradicts the concept of fiscal neutrality. The concepts are not mutually exclusive. The concept of revenue neutrality is only included in this rule amendment to the extent that the law provides for the municipalities to recover at least their 1998 base amount through the access line compensation regime, insofar as the access line fee multiplied over the number of access lines in each category does not fall below the 1998 level. There is no express promise of revenue neutrality anywhere in statute or rule. The economic benefits discussed by the commission in the proposed preamble are unrelated to the municipal base amount. The commission acknowledges that fiscal neutrality relates to the concept of "competitive neutrality" stated in the Legislature's purpose under §283.001. The base amount established under §283.053 and developed in commission rules incorporates the concept of fiscal neutrality in the calculation based upon 1998 revenues. The commission, therefore, finds that the economic benefit analysis does not contradict the concept of fiscal neutrality.

The Legislature expressly reserved to municipalities the specific authority to manage a public ROW to ensure the health, safety, and welfare of the public. Plano and TCCFUI refer to several burdens that fall upon the municipalities, such as construction, installation, maintenance, and repairs. The commission understands these burdens to be the responsibility of municipalities. The authority for addressing these burdens falls within the purview of municipalities under the police power-based regulations reserved to municipalities in §283.056(c). However, the commission disagrees with Plano's assertion that the statute leaves ROW regulation policy decision solely to the municipalities. The commission disagrees that the adopted amendment to §26.465 in any way exceeds the commission's authority established by the statute.

The commission asserts, again, that the rule amendment to §26.465 does not constitute or promote free use of the public ROW. For detailed analysis, see the commission's response to arguments for and against the adopted amendment to §26.465. The commission disagrees with Leon Valley's implication that the commission expects police power-based regulations to replace ROW compensation. No CTP is using the ROW "free of charge" under Chapter 283. The commission disagrees with Plano's assertion that there will be an immediate fiscal impact to cities when the commission adopts the amendment to §26.465(d). Pass-through lines are fully compensated under the access line compensation regime. There is simply no room in the language of the statute to allow additional compensation to be required for other access lines located in the public ROW under other ordinances or franchise agreements. The total access lines within the city and the total fees are a proxy for the compensation formerly received under the

franchise regime. Therefore, a one-to-one correlation between access lines and municipal fees is unnecessary to ensure that a city receives adequate and appropriate compensation for use of the public ROW by CTPs. This is not "free use" of the ROW, but instead usage fully compensated under the HB 1777 regime. Therefore, municipalities will experience no fiscal impact because the concept of full compensation indicates revenue neutrality.

The commission disagrees with Leon Valley's argument that the retained right of cities to initiate legal action is hardly a useful right. Municipal police powers are of paramount benefit to its citizens. The commission notes that the Legislature recognizes the value of a municipality's legal action options. Otherwise, the Legislature would not have expressly retained that power to the municipalities in §283.051. The commission asserts that public ROW is public property, not private property, and that no citizens are experiencing any taking of public property by private entities in this situation, as all CTP usage of ROW for access lines is fully compensated under the access line compensation regime. There is no, nor should there be, double financial burden on citizens.

The commission disagrees with TCCFUI's position in its letter of March 19, 2001 and with Plano's assertion that the construction of lines that pass through the public ROW affects the commission's statement of revenue neutrality. The commission maintains that there will be no effect on local economy or local employment as a result of the rule amendment. The fiscal impact of pass-through lines rests on the expectation of a municipality for a revenue amount rather than on a true impact to that amount. The

proposed amendment does not alter a provider's choice as to where infrastructure should be placed. Therefore, this rulemaking will have no impact on the local economy.

The commission maintains that the notice published in the April 6, 2001 issue of the *Texas Register* complied with Texas Government Code §2001.024(a)(4)(A). In compliance, the preamble to the proposed rule amendments stated that staff " . . . determined that for each year of the first five-year period the proposed amendment and proposed new section are in effect, there will be no fiscal implications for the state as a result of enforcing or administering the sections. Because there are at least 1100 diverse municipalities in Texas, fiscal implications may vary. However, because these proposed rules do not alter a municipality's option to exercise its police power-based regulations in accordance with Texas Local Government Code §283.056(c), there should be no fiscal impact on any given municipality. In addition, because Texas Local Government Code §283.051(b) provides that municipalities continue to have the right to initiate legal action against CTPs, there is no fiscal implication regarding remedies available to municipalities."

TCCFUI's suggestion that there will be major costs of litigating the validity of the new rule is misplaced. TCCFUI's comment implied that Texas Government Code §2001.002 requires an analysis of the probability of lawsuits regarding the validity of every rule proposed in the State of Texas because lawsuits affect the local economy. The commission believes that it adopts only valid rules. In this particular instance, the adopted rule amendment follows the text of the statute and is therefore certainly a valid

interpretation. Texas Government Code §2001.022 requires the commission to determine the affect a proposed rule will have on the local economy rather than the affect of potential resulting litigation. The possibility that a municipality, person, or entity may challenge the validity of a rule by means of litigation is beyond the speculative scope of the commission. The commission believes that the proposed rule amendment follows and clarifies provisions of the statute, thereby fairly reducing uncertainty and litigation concerning franchise fees in accordance with the stated purpose in Texas Local Government Code §283.001(a)(4). Further, the commission observes that neither HB 1777 nor the proposed rule amendment modifies the stakeholders' option of litigious remedies. Texas Local Government Code §283.051(b) expressly provides that the right of a municipality to initiate legal action against a CTP is not affected. Now, as before the existence of HB 1777, municipalities retain their option to initiate suit against a provider. The commission's proposed rule amendment exercises no control over a municipality's decision to initiate litigation.

In fulfillment of the Texas Government Code §2001.022 requirements, the commission determined that the proposed rule amendment would have no affect on the local economy. Therefore, no local employment impact statement was required of the Texas Employment Commission (now the Texas Workforce Commission). The commission notes that House Bill 1872 of the 77th Texas Legislature, Regular Session (2001) becomes effective September 1, 2001 making the determination the responsibility of each state agency before rule adoption. Therefore, in an abundance of caution, the

commission again makes its determination that the proposed amendment and adopted rule do not affect the local economy or employment.

The commission declines to modify the rule amendment in response to TCCFUI's unofficial comment concerns or to official comments.

All written and oral comments, including any not specifically referenced herein, were fully considered by the commission.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2001) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The amendment is also adopted under Texas Local Government Code §283.058, which grants the commission jurisdiction over municipalities and CTPs necessary to enforce the provisions of Chapter 283.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052 and Texas Local Government Code §283.058.

§26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

(a) **Purpose**. This section establishes a uniform method for counting access lines within a municipality by category as provided by §26.461 of this title (relating to Access Line Categories), sets forth relevant reporting requirements, and sets forth certain reseller obligations under the Local Government Code, Chapter 283.

(b) **Application**. This section applies to all certificated telecommunications providers (CTPs) in the State of Texas.

(c) **Definitions**. The following words and terms when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(1) **Customer** – The retail end-use customer.

(2) **Transmission path** – A path within the transmission media that allows the delivery of switched local exchange service.

(A) Each individual circuit-switched service shall constitute a single transmission path.

(B) Where services are offered as part of a bundled group of services, each switched service in that bundled group of services shall constitute a single transmission path.

(C) Only those services that require the use of a circuit-switch shall constitute a switched service.

(D) Services that constitute vertical features of a switched service, such as call waiting, caller-ID, etc., that do not require a separate switched path, do not constitute a transmission path.

(E) Where a service or technology is channelized by the CTP and results in a separate switched path for each channel, each such channel shall constitute a single transmission path.

(3) **Wireless provider** – A provider of commercial mobile service as defined by §332(d), Communications Act of 1934 (47 U.S.C. §151 *et seq*.), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66).

(d) **Methodology for counting access lines.** A CTP's access line count shall be the sum of all lines counted pursuant to paragraphs (1), (2), and (3) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.

(1) **Switched transmission paths and services.**

(A) The CTP shall determine the total number of switched transmission paths, and shall take into account the number of switched services provided and the number of channels used where a service or technology is channelized.

(B) All switched services shall be counted in the same manner regardless of the type of transmission media used to provide the service.

(C) If the transmission path crosses more than one municipality, the line shall be counted in, and attributed to, the municipality where the end-use customer is located. Pursuant to Local Government Code §283.056(f), the per-access-line franchise fee paid by CTPs constitutes full compensation to a municipality for all of a CTP's facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation.

(2) **Nonswitched telecommunications services or private lines.**

(A) Each circuit used to provide nonswitched telecommunications services or private lines to an end-use customer, shall be considered to have two termination points, one on each customer location identified by the customer and served by the circuit.

(B) The CTP shall count nonswitched telecommunications services or private lines by totaling the number of terminating points within a municipality.

(C) A nonswitched telecommunications service shall be counted in the same manner regardless of the type of transmission media used to provide that service.

(D) A terminating point shall be counted in, and attributed to, the municipality where that point is located. In the event a CTP is not able to identify the physical location of the terminating point, that

point shall be attributed to the municipality identified by the CTP's billing systems.

(E) Where dark (unlit) fiber is provided to an end-use customer who then lights it, the line shall be counted as a private line, by default, unless it is evident that it is used for providing switched services.

(3) **Central office based PBX-type services**. The CTP shall count one access line for every ten stations served.

(e) **Lines to be counted.** A CTP shall count the following access lines:

(1) all access lines provided to a retail end-use customer;

(2) all access lines provided as a retail service to other CTPs and resellers for their own end-use;

(3) all access lines provided as a retail service to wireless telecommunication providers and interexchange carriers (IXCs) for their own end-use;

(4) all access lines a CTP provides as employee concession lines and other similar types of lines;

(5) all access lines provided as a retail service to a CTP's wireless and IXC affiliates for their own end-use, and all access lines provided as a retail service to any other affiliate for their own end-use;

(6) dark fiber, to the extent it is provided as a service or is resold by a CTP and shall exclude lines sold and resold by non-CTPs;

(7) any other lines meeting the definition of access line as set forth in §26.461 of this title; and

(8) Lifeline and Tel-assistance lines.

(f) **Lines not to be counted.** A CTP shall not count the following lines:

(1) all lines that do not terminate at an end-use customer's premises;

(2) lines used by providers who are not end-use customers such as CTP, wireless provider, or IXC for interoffice transport, or back-haul facilities used to connect such providers' telecommunications equipment;

(3) lines used by a CTP's wireless and IXC affiliates who are not end-use customers, for interoffice transport, or back-haul facilities used to connect such affiliates' telecommunications equipment;

(4) lines used by any other affiliate of a CTP for interoffice transport; and

(5) any other lines that do not meet the definition of access line as set forth in §26.461 of this title.

(g) **Reporting procedures and requirements.**

(1) **Who shall file.** The record keeping, reporting and filing requirements listed in this section shall apply to all CTPs in the State of Texas.

(2) **Reporting requirements.** Unless otherwise specified, periodic reporting shall be consistent with this subsection and subsection (d) of this section.

(A) **Initial reporting.**

(i) No later than January 24, 2000, a CTP shall file its access line count using the commission-approved *Form for Counting Access Line or Program for Counting Access*

Lines with the commission. The CTP shall report the access line count as of December 31, 1998, except as provided in clause (iii) of this subparagraph.

(ii) A CTP shall not include in its initial report any access lines that are resold, leased, or otherwise provided to a CTP, unless it has agreed to a request from another CTP to include resold or leased lines as part of its access line report.

(iii) A CTP that cannot file access line count as of December 31, 1998 shall file request for good cause exemption and shall file the most recent access line count available for December, 1999.

(iv) A CTP shall not make a distinction between facilities and capacity leased or resold in reporting its access line count.

(B) **Subsequent reporting.**

(i) Each CTP shall file with the commission a quarterly report beginning the second quarter of the year 2000, showing the number of access lines, including access lines by category, that the CTP has within each municipality at the end of each month of the quarter. The report shall be filed no later than 45 days after the end of the quarter using the commission-approved Form for Quarterly Reporting of

Access Lines and shall coincide with the payment to a municipality.

(ii) The first report shall be due to the commission no later than August 15, 2000 and shall include access line for the second calendar quarter of 2000 and shall coincide with the first payment to a municipality pursuant to the Local Government Code, Chapter 283.

(iii) Except as provided in clause (iv) of this subparagraph, on request of the commission, and to the extent available, the report filed under clause (i) of this subparagraph shall identify, as part of the CTP's monthly access line count, the access lines that are provided by means of resold services or unbundled facilities to another CTP who is not an end-use customer, and the identity of the CTPs obtaining the resold services or unbundled facilities to provide services to customers.

(iv) A CTP may not include in its monthly count of access lines any access lines that are resold, leased, or otherwise provided to another CTP if the CTP receives adequate proof that the CTP leasing or purchasing the access lines will include the access lines in its own monthly count. Adequate proof shall consist of a notarized statement prepared consistent with subsection (k) of this section.

(v) The CTP shall respond to any request for additional information from the commission within 30 days from receipt of the request.

(vi) Reports required under this subsection may be used by the commission only to verify the number of access lines that serve customer premises within a municipality.

(vii) On request from a municipality, and subject to the confidentiality protections of subsection (j) of this section, each CTP shall provide each affected municipality with a copy of the municipality's access line count.

(h) **Exemption**. Any CTP that does not terminate a franchise agreement or obligation under an existing ordinance shall be exempted from subsequent reporting pursuant to subsection (g)(2)(B) of this section unless and until the franchise agreement is terminated or expires on its own terms. Any CTP that fails to provide notice to the commission and the affected municipality by December 1, 1999 that it elects to terminate its franchise agreement or obligation under an existing ordinance, shall be deemed to continue under the terms of the existing ordinance. Upon expiration or termination of the existing franchise agreement or ordinance by its own terms, a CTP is subject to the terms of this section.

(i) **Maintenance and location of records.** A CTP shall maintain all records, books, accounts, or memoranda relating to access lines deployed in a municipality in a

manner which allows for easy identification and review by the commission and, as appropriate, by the relevant municipality. The books and records for each access line count shall be maintained for a period of no less than three years.

(j) **Proprietary or confidential information.**

(1) The CTP shall file with the commission the information required by this section regardless of whether this information is confidential. For information that the CTP alleges is confidential and/or proprietary under law, the CTP shall file a complete list of the information that the CTP alleges is confidential. For each document or portion thereof claimed to be confidential, the CTP shall cite the specific provision(s) of the Texas Government Code, Chapter 552, that the CTP relies to assert that the information is exempt from public disclosure. The commission shall treat as confidential the specific information identified by the CTP as confidential until such time as a determination is made by the commission, the Attorney General, or a court of competent jurisdiction that the information is not entitled to confidential treatment.

(2) The commission shall maintain the confidentiality of the information provided by CTPs, in accordance with the Public Utility Regulatory Act (PURA) §52.207.

(3) If the CTP does not claim confidential treatment for a document or portions thereof, then the information will be treated as public information. A claim of confidentiality by a CTP does not bind the

commission to find that any information is proprietary and/or confidential under law, or alter the burden of proof on that issue.

(4) Information provided to municipalities under the Local Government Code, Chapter 283, shall be governed by existing confidentiality procedures which have been established by the commission in compliance with PURA §52.207.

(5) The commission shall notify a CTP that claims its filing as confidential of any request for such information.

(k) **Report attestation.** All filings with the commission pursuant to this section shall be in accordance with §22.71 of this title (relating to Filing of Pleadings, Documents and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to Be Filed With the Commission). The filings shall be attested to by an officer or authorized representative of the CTP under whose direction the report is prepared or other official in responsible charge of the entity in accordance with §26.71(d) of this title (relating to General Procedures, Requirements and Penalties). The filings shall include a certified statement from an authorized officer or duly authorized representative of the CTP stating that the information contained in the report is true and correct to the best of the officer's or representative's knowledge and belief after inquiry.

(l) **Reporting of access lines that have been provided by means of resold services or unbundled facilities to another CTP.** This subsection applies only to a CTP

reporting access lines under subsection (g) of this section, that are provided by means of resold services or unbundled facilities to another CTP who is not an end-use customer. Nothing in this subsection shall prevent a CTP reporting another CTP's access line count from charging an appropriate, tariffed administrative fee for such service.

(m) **Commission review of the definition of access line.**

(1) Pursuant to the Local Government Code §283.003, not later than September 1, 2002, the commission shall determine whether changes in technology, facilities, or competitive or market conditions justify a modification of the adoption of the definition of "access line" provided by §26.461 of this title. The commission may not begin a review authorized by this subsection before March 1, 2002.

(2) As part of the proceeding described by paragraph (1) of this subsection, and as necessary after that proceeding, the commission by rule may modify the definition of "access line" as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines within the municipalities.

(3) After September 1, 2002, the commission, on its own motion, shall make the determination required by this subsection at least once every three years.

This agency hereby certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers, is hereby adopted with changes to the text as proposed. It is also ordered that proposed §26.469, relating to Public Right-of-Way Fees and Penalties, is withdrawn from consideration for adoption.

ISSUED IN AUSTIN, TEXAS ON THE 24th DAY OF SEPTEMBER 2001.

PUBLIC UTILITY COMMISSION OF TEXAS

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Chairman Max Yzaguirre

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Commissioner Brett A. Perlman

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Commissioner Rebecca Klein